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## FOREWORD

The gap between those who conduct mediation and those who study mediation is inexplicably enormous. Complaints about the gap come not only from academics who would like to see some attention paid to their analysis by practitioners but from as deep into the practitioners' world as the United Nations Secretariat, who would like to be useful in training newly selected envoys. The complaints from the practitioners' side frequently cite (when at all) the academic's language, which they find too difficult. Indeed, the [Department of Political Affairs \(DPA\)](#) of the U.N. Secretariat has recently established an International Academic Advisory Council to promote more systematic exchanges linking theory and academic analysis with practice and to support the generation and dissemination of knowledge for mediation practitioners. This is precisely what this issue of the [Penn State Journal of Law & International Affairs](#) intends to do, and it carries it off with skill and knowledge. Without talking down, the articles lay out established understandings drawn from mediation practice when it is well done and then carry forth the implications of established knowledge into new questions. The ball now is in the practitioners' court, to use and test the transmitted knowledge, provide the world with better results from mediation, and provide the analysts with new data to turn into knowledge.

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## TRANSLATING SCHOLARSHIP INTO POLICY

*Scott Sigmund Gartner & Amy C. Gaudion\**

### INTRODUCTION

In 2011, there were thirty-seven ongoing intrastate and interstate armed conflicts that together resulted in thousands of civil and military deaths. During that same year, only one peace agreement was signed.<sup>1</sup> Clearly there is tremendous room for improvement in peacemaking. Mediation represents one of the most commonly used mechanisms for preventing and resolving violent, international conflict. In mediation, disputants more or less willingly work with a third party to reach a mutually acceptable agreement. Mediation is voluntary and contractual, as compared to arbitration which is binding and judgmental. Mediation involves: two (or more) disputants, one (or more) mediators, and one (or more) disputes. Mediators can structure the disputants' discussion (called *Communications Facilitation*), resolution process (called a *Procedural Mediation Strategy*), or agreement (called a *Directive Mediation Strategy*).

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<sup>1</sup> *Uppsala Conflict Data Program*, DEPARTMENT OF PEACE AND CONFLICT RESEARCH, UPPSALA UNIVERSITET, <http://www.pcr.uu.se/research/ucdp/>.

Most disputes require multiple management efforts and most mediated disputes eventually end peacefully.<sup>2</sup>

Since the end of the Cold War, the incidence of international dispute peacemaking—especially third-party mediation of civil wars—has skyrocketed. Figure 1 shows the dramatic shift from interstate to intrastate (civil) war mediation.<sup>3</sup> At the same time, there has been a surge in the study of international dispute mediation. Not only has the quantity of research on international dispute mediation increased, but the research has become increasingly rigorous and scientific. Scholars now regularly employ large data sets, state-of-the-art statistical methods, and sophisticated math modeling techniques to examine questions such as: who mediates, which strategies are most likely to lead to peace, and why do some agreements last longer than others? These recent, innovative approaches have led to a massive increase in scholars' understanding of both interstate and civil war peacemaking.

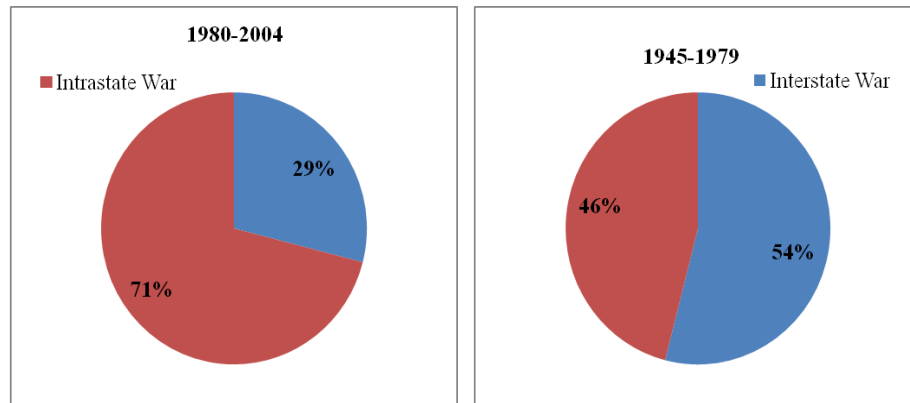
Filled with jargon and containing steep learning curves, however, these new approaches have also significantly impeded the ability of practitioners to draw lessons from current research. The result is an ever widening gap between conflict resolution policymakers and scholars—a tragedy given practitioners' dire need for new ideas to help resolve deadly conflicts and the growing knowledge researchers have to share.

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<sup>2</sup> For an introduction to international dispute mediation, see J. MICHAEL GREIG & PAUL F. DIEHL, *INTERNATIONAL MEDIATION* (2012). For an introduction to recent research on international dispute mediation, see JACOB BERCOVITCH & SCOTT SIGMUND GARTNER, *INTERNATIONAL CONFLICT MEDIATION: NEW APPROACHES AND FINDINGS* (2009).

<sup>3</sup> Scott Sigmund Garter, *Civil War Peacemaking*, in J. JOSEPH HEWITT, JONATHAN WILKENFELD & TED ROBERT GURR, *PEACE AND CONFLICT* 2012, 71, 73 (2012).

**Figure 1. Conflict Management Frequency by Dispute Type,  
Before and After 1980**



This lament is not new but scholars and policymakers have recently become more vocal in noting the disconnect between analysis and policy: “policy making and academic research should be in constant, productive conversation, and scholars and researchers should be an invaluable resource for policy makers, but they are not.”<sup>4</sup> Indeed, just this year, the [United Nations Department of Political Affairs](#) established the Academic Advisory Council on Mediation initiative—an entity charged with making research findings known and accessible to practitioners.<sup>5</sup>

The goal of this issue of the [Penn State Journal of Law & International Affairs](#) is to narrow the gap between peacemaking scholars and practitioners. We have worked together to bridge these communities to create a broad, informed and useful understanding of

<sup>4</sup> Robert L. Gallucci, *How Scholars Can Improve International Relations*, CHRONICLE OF HIGHER EDUC., Nov. 26, 2012, <http://chronicle.com/article/How-Scholars-Can-Improve/135898/>.

<sup>5</sup> U.N. Secretary-General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution: Rep. of the Secretary-General*, U.N. Doc. A/66/811 (June 25, 2012), <http://reliefweb.int/sites/reliefweb.int/files/resources/N1234641.pdf>.

dispute resolution. In the nine essays that follow, scholars translate their analytical research into clear policy implications. The result is an accessible and comprehensive source of lessons learned from current peacemaking research. The essays are fully cited, so that readers may continue learning about a research topic. In the conclusion, Dr. Dennis Jett, a former Ambassador to Mozambique and Peru and a current professor at Penn State's School of International Affairs, provides a framework for how to assess the applicability of policy implications and highlights a number of the essays' most critical peacemaking recommendations.

We have undertaken extensive efforts to make these essays relevant to the policy and legal communities, and also grounded in current peacemaking scholarship. The research was presented at numerous workshops held by the [Folke Bernadotte Academy](#), all of which included ambassadors and other peacemaking practitioners in addition to well-known peacemaking scholars. The essays were anonymously reviewed by a distinguished mediation scholar, well known to both the academic and policy peacemaking communities. In addition, the essays were vetted by School of International Affairs legal and international affairs scholars. Finally, the essays went through the [Penn State Journal of Law & International Affairs](#) editorial process. The result of this rigorous review is a unique and innovative series of articles that are both analytical and practical; compact essays that quickly and accessibly summarize a complex and extensive body of research and identify its most salient peacemaking policy implications.

#### PEACEMAKING TRANSLATIONS

The essays in this issue address critical aspects of international conflict resolution and are framed to initiate a conversation with the policymakers tasked with resolving the complex real world problems arising out of these conflicts.

In the opening essay,<sup>6</sup> Birger Heldt, of Sweden's Folke Bernadotte Academy, examines the impact that coordination has on peacemaking efforts. He offers recommendations on how to utilize regional organizations, a pre-determined division of labor, and longer-term peacemaking strategy to achieve more sustainable peace, and concludes that closer attention to coordination issues may have the synergistic—and positive—effect of building a culture of prevention and peacemaking.

The essay by Isak Svensson,<sup>7</sup> of the Department of Peace and Conflict Research at Uppsala University, also challenges conventional practices in peacemaking. He contests the proposition that neutral or unbiased mediators are the most effective. Recognizing the complexities inherent in the process, he proposes that mediator bias be viewed as an open explanatory empirical factor rather than a barrier to conflict management. He identifies instances and circumstances when biased mediators actually may outperform their neutral counterparts—and thus, should be the preferred mediator type. Similarly, the essay by Scott Sigmund Gartner,<sup>8</sup> of Penn State's School of International Affairs, challenges the common view that mediation is the least effective form of dispute resolution. He shows that a process known as “selection effects” distorts the inferences we draw from observations of peacemaking, leading us to infer erroneously that mediation is ineffective when in reality it is actually highly effective in facilitating peaceful outcomes. David E. Cunningham,<sup>9</sup> of the University of Maryland, continues this thread by upending the view that “veto players”—those groups or entities that have the ability to block settlement and prolong a conflict—should be excluded from settlement talks. Rather, he offers policymakers a prescription for including such players in the settlement process to achieve a more lasting peace. In addition, Cunningham argues that

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<sup>6</sup> Birger Heldt, [The Lack of Coordination in Diplomatic Peacemaking](#), 2 PENN. ST. J.L. & INT'L AFF. 9 (2013).

<sup>7</sup> Isak Svensson, [Research on Bias in Mediation: Policy Implications](#), 2 PENN. ST. J.L. & INT'L AFF. 17 (2013).

<sup>8</sup> Scott Sigmund Gartner, [Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds](#), 2 PENN. ST. J.L. & INT'L AFF. 27 (2013).

<sup>9</sup> David E. Cunningham, [Who Should Be at the Table?: Veto Players and Peace Processes in Civil War](#), 2 PENN. ST. J.L. & INT'L AFF. 38 (2013).

settlement talks are most likely to succeed if they exclude other, non-veto players, from negotiations aimed at ending the war.

Each essay offers substantive guidance to peacemakers in the field; several, however are noteworthy in their ability to specifically address ongoing disputes. One of the most daunting and seemingly intractable situations confronting policymakers today is the conflict in Syria. In a provocative essay, J. Michael Greig<sup>10</sup> of the University of North Texas, explains why mediation efforts have failed there, and offers an unconventional prescription for addressing future conflicts with similar characteristics. The disheartening lack of progress observed in Syria can also be seen in the ongoing conflicts in the Democratic Republic of Congo (DRC) and Mali, which remain in a static yet deadly limbo. The essay by Kyle Beardsley<sup>11</sup> of Emory University, offers timely and valuable insights to the policymakers tasked with resolving these conflicts. He explores the importance of allowing third-party mediators the flexibility to select mediation tools and styles suitable to the character and context of the conflict. He offers recommendations on how much leverage is needed to stop ongoing brutal violence in the short term and the effectiveness of “lighter tactics” in helping disputants overcome the final barriers to settlement—observations that may be of particular relevance to policymakers on the ground in Syria, Mali and the DRC.

Similarly, two other essays offer insights on the form and process for achieving successful mediation results. Stephen Gent,<sup>12</sup> of the University of North Carolina, explores why states are reluctant to use legal mechanisms, most notably arbitration and adjudication, to resolve disputes despite the fact that these mechanism have proven to be highly effective. He examines political and other dynamics that create such hesitancy, and then offers guidance to policymakers on helping states overcome their aversion to legal dispute forums. The

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<sup>10</sup> J. Michael Greig, [\*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation\*](#), 2 PENN. ST. J.L. & INT’L AFF. 48 (2013).

<sup>11</sup> Kyle Beardsley, [\*Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution\*](#), 2 PENN. ST. J.L. & INT’L AFF. 57 (2013).

<sup>12</sup> Stephen E. Gent, [\*The Politics of International Arbitration and Adjudication\*](#), 2 PENN. ST. J.L. & INT’L AFF. 66 (2013).



essay by Molly Melin,<sup>13</sup> of Loyola University of Chicago, explores the unique role that state mediators can play and the distinct benefits offered by state-led mediation. Her essay highlights factors policymakers should consider when assessing whether to use state-led mediation. Drawing on existing research, she identifies the conflict characteristics and other circumstances under which state-led mediation efforts will be the most effective and sustainable.

Finally, an essay by Victor Asal of the University of Albany and Jonathan Wilkenfeld<sup>14</sup> of the University of Maryland aims its criticism at scholars and policymakers alike for failing to recognize the tremendous harm caused by generalizing ethnic behavior—i.e., attributing negative characteristics (for example violence or terrorism tactics) to an entire ethnic group when the characteristics are more appropriately attributed to a smaller political entity within that ethnic group and maybe even lack accuracy when describing that smaller entity. Their analysis and conclusions will have particular relevance as states seek to define the threat posed by today's ethno-political groups, most notably Hamas and Al Qaeda—two groups that seem to be moving away from violence as a defining characteristic and toward more political and social outreach identities.

#### A PEACEMAKING TOOL KIT

These essays identify an extensive number of critical policy implications and in some cases, concrete recommendations—creating, in essence, a peacemaking tool kit. How does one evaluate them all? Where should one start? In his concluding essay, Ambassador Jett puts forward guidelines for evaluating policy implications like those presented. He argues that “mediators are often crucial to reaching a peaceful resolution to a conflict” but that mediation is not a “silver bullet.”<sup>15</sup> For mediation to be successful,

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<sup>13</sup> Molly M. Melin, [\*When States Mediate\*](#), 2 PENN. ST. J.L. & INT'L AFF. 78 (2013).

<sup>14</sup> Victor Asal & Jonathan Wilkenfeld, [\*Ethnic Conflict: An Organizational Perspective\*](#), 2 PENN. ST. J.L. & INT'L AFF. 91 (2013).

<sup>15</sup> Dennis C. Jett, [\*Mediation—Its Potential and Its Limits: Developing an Effective Discourse on the Research and Practice of Peacemaking\*](#), 2 PENN. ST. J.L. & INT'L AFF. 103 (2013).

policymakers need to be as informed as possible on what works when. Using this approach, Jett highlights the policy implications especially relevant to peacemakers: (1) mediator bias tends to lead to different outcomes; (2) mediators get the toughest cases and the most intractable disputes; (3) more may not be better when it comes to dispute resolution; (4) assumptions about the nature of ethnic conflict can result in bad peacemaking choices; and (5) in some types of disputes, arbitration might be more effective than mediation (and vice versa). Because these conclusions are drawn from studies of the patterns of past peacemaking events (or incidents) and are informed by an understanding of conflict management dynamics and history, their applicability to the dispute scenarios facing today's conflict managers (or policymakers) is compelling.

### CONCLUSION

Research tends to swing like a pendulum between analytic and rigorous methods and accessible and relevant approaches. We reject this tradeoff. We believe that research can be simultaneously rigorous and relevant, and analytic and accessible. Given the devastating loss of life associated with armed conflict, the need for translating research results into policy prescriptions is especially strong in peacemaking. This issue has tackled the translation of nine critical research agendas on dispute resolution into a series of policy recommendations that peacemakers can employ. As William Zartman ambitiously writes in his foreword to this issue: “[t]he ball now is in the practitioners’ court, to use and test the transmitted knowledge, provide the world with better results from mediation, and provide the analysts with new data to turn into knowledge.”<sup>16</sup>

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<sup>16</sup> I. William Zartman, [Foreword](#), 2 PENN. ST. J.L. & INT’L AFF. i (2013).

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## THE LACK OF COORDINATION IN DIPLOMATIC PEACEMAKING

*Birger Heldt\**

As often observed in recent studies on peacemaking, there has been a shift from a few high-profile mediators to the present situation, characterized by states, ad-hoc groups of states and inter-governmental organizations (IGOs) (Track I diplomacy) as well as non-governmental organizations (NGOs), local organizations and prominent figures (Track II diplomacy). The origin of this shift may be traced back to the early 1990s when the United Nations initiated efforts to increase and coordinate the contributions of regional arrangements for addressing threats to international peace and security.<sup>1</sup> One alleged impetus for the change was the United

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<sup>1</sup> See Jochen Prantl, *Informal Groups of States and the UN Security Council*, 59 INT'L ORG. 559, 561, 584 (2005); Birger Heldt, *Trends from 1948-2005: How to View the Relation between the United Nations and Non-UN Entities*, in PEACE OPERATIONS: TRENDS, PROGRESS, AND PROSPECTS 9 (Donald C.F. Daniel et al. eds., 2008); Hikaru Yamashita, *Peacekeeping Cooperation Between the United Nations and Regional Organisations*, 38 REV. INT'L STUD. 165, 167, 171 (2010); accord U.N. Secretary-General, *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping: Rep. of the Secretary-General*, U.N. DOC. A/47/277-S/24111 (June 17, 1992) <http://www.un-documents.net/a47-277.htm> (highlighting prevention); U.N. Secretary-General, *Secretary-General Says Global Effort Against Armed Conflict Needs Change from "Culture of Reaction to Culture of Prevention"*, U.N. PRESS RELEASE SC/6759 (Nov. 29, 1999) <http://www.un.org/News/Press/docs/1999/19991129.sc6759.doc.html>; U.N. Secretary-General, *Prevention of Armed Conflict: Rep. of the Secretary-General*, U.N. DOC. A/55/985-S/2001/574 (June 7, 2001), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20S%202001%20574.pdf>, (devotes an entire report, for the first time, to the broad topic of

Nation's perceived inability to cope with the demand for peacekeeping and peacemaking in the immediate aftermath of the Cold War.<sup>2</sup> The increase in peacemaking actors may also be a consequence of the expanded space for third-party initiatives as Cold War rivalries ended. Regardless of the cause, this development conforms with Article 52 of the U.N. Charter, which encourages peace initiatives from regional actors as the first resort before cases are referred to the U.N., which should be the last resort.<sup>3</sup>

The increased number of peacemaking actors coincides with “a five-fold increase in the number of diplomatic interventions” in conflicts (both protracted and emerging) in the 1990s, as compared to the 1980s.<sup>4</sup> Similarly, the number of U.N. peacemaking initiatives increased by approximately forty percent during 2000-2003 as compared with the 1990s, and fivefold between 1989 and 2002.<sup>5</sup> Furthermore, peacemaking initiatives of so-called Groups of Friends (small ad-hoc groupings of states and IGOs) increased seven-fold between 1991 and 2006.<sup>6</sup> Moreover, between 1993 and 2004, there were 550 third-party peacemaking initiatives (mediation, third-party-moderated direct talks, and good offices) in emerging conflicts alone.<sup>7</sup>

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conflict prevention); U.N. Secretary-General, *Rep. of the Secretary-General on Enhancing Mediation and its Support Activities*, U.N. DOC. S/2009/189 (Apr. 8, 2009), available at <http://www.un.org/docs/sc/sgrep09.htm>, (discussing mediation); U.N. Secretary-General, *Preventive Diplomacy: Delivering Results: Rep. of the Secretary-General*, U.N. DOC. S/2011/552 (Aug. 26, 2011), [http://peacemaker.un.org/sites/peacemaker.un.org/files/SG\\_Report\\_PreventiveDiplomacy\\_S2011552\(english\)\\_1.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SG_Report_PreventiveDiplomacy_S2011552(english)_1.pdf), (summarizing the narrower topic of preventive diplomacy); BERTRAND G. RAMCHARAN, *PREVENTIVE DIPLOMACY AT THE UN* (2008) (providing a detailed account of preventive diplomacy and peacemaking by the U.N.).

<sup>2</sup> See Prantl, *supra* note 1, at 561.

<sup>3</sup> U.N. Charter art. 52, para. 2 (“[M]ake every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.”), <http://www.un.org/en/documents/charter/chapter8.shtml>.

<sup>4</sup> HUMAN SECURITY REPORT PROJECT, *HUMAN SECURITY REPORT 2009/2010: THE CAUSES OF PEACE AND THE SHRINKING COSTS OF WAR* 6, 63 (2011) [hereafter *SECURITY*] <http://www.hsrgroup.org/human-security-reports/20092010/overview.aspx>.

<sup>5</sup> *Id.* at 67.

<sup>6</sup> *Id.*

<sup>7</sup> FRIDA MÖLLER, *CODEBOOK FOR THE DATASET MANAGING INTRASTATE LOW-LEVEL CONFLICT (MILC)* (2007) (for data and detailed dataset

The increased amount of peacemaking, however, is accompanied by a low success rate. On average, there were 31 peacemaking attempts for every agreement in emerging civil conflicts from 1993 to 2004, and only fifteen percent of these conflicts ended through an agreement (as compared to the other outcomes of victory, low activity or escalation to war).<sup>8</sup>

This article focuses on recent emerging<sup>9</sup> conflicts, and assesses whether peacemaking has been characterized by coordination. The second section examines empirical patterns and their consequences. The third section is an attempt to formulate policy implications that touch upon the role of regional organisations, a pre-determined division of labour, and the importance of having a long-term peacemaking strategy. The focus of this analysis should not diminish efforts to deal with another problem: the general inaction on the part of the international community in responding to the large majority of emerging conflicts may be a bigger problem than the over-attention suffered by a few cases.

#### MUCH PEACEMAKING, BUT LITTLE COORDINATION

Peacemaking is prevalent, but is often not coordinated with regard to choice of tools (mediation, etc.), the agenda or the issues of the talks. This lack of coordination has for many years been recognized as detrimental. It allows conflict parties to “shop around,” wait for better deals, play the third parties against one another in search of a better deal, or sabotage peacemaking attempts.<sup>10</sup> This

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on peacemaking); Birger Heldt, *Sequencing of Peacemaking: A Pilot Study* (July 17, 2012) (unpublished paper) (source of the number of peacemaking initiatives, which builds on data found in Möller). “Good office” refers to instances where third parties facilitate talks by offering conflict parties a venue to meet and communicate directly, but do not actively engage in, or moderate, the talks.

<sup>8</sup> Heldt, *supra* note 7.

<sup>9</sup> As used here “emerging” is defined as a conflict that has resulted in at least 25—but less than 1,000—deaths per year.

<sup>10</sup> See generally Birger Heldt, *Preventive Diplomacy in Emerging Intrastate Conflicts: Some Historical Patterns*, in *THIRD PARTIES AND CONFLICT PREVENTION* 210 (Anders Mellbourn ed., 2008); Tobias Böhmelt, *Disaggregating Mediations: The Impact of Multiparty Mediation*, 41 *BRIT. J. POL. SCI.* 859 (2011); U.N. Secretary-General, *Rep. of the Secretary-General on Enhancing Mediation and its Support Activities*, U.N. Doc.

insight is corroborated by statistical findings that indicate a negative relationship between the number of involved third parties and the likelihood of reaching a negotiated agreement in terms of ceasefires, partial or full peace agreements that halt the violence.<sup>11</sup> A study of the size of Group of Friends mechanisms—most of which were applied on protracted instead of emerging conflicts—makes a similar observation: the larger the size of a Group of Friends, the less consistent the action.<sup>12</sup> Coordination is thus very difficult, even when coordination mechanisms are in place.

One example, among the worst cases in this regard, is the conflict between Bosnia and Herzegovina and the insurgent Croat Republic of Bosnia and Herzegovina. From October to December of 1993 a plethora of Track I and Track II actors attempted to resolve the conflict. Mediation (M), third-party moderated direct talks (D) and good offices (G) were initiated in the following sequence: D, D, G, D, G, G, D, M, D, G, D, D, G, G, G, M, D, G, G, M, G, G, M.”<sup>13</sup> Equally disorderly was the sequence of issues discussed, in terms of how the talks moved back and forth between basic incompatibility (government power or independence/autonomy), behavior (ceasefires, withdrawal of troops, etc.), and other issues (refugees, talks about talks, etc.).<sup>14</sup>

It is in this particular case difficult to discern a strategy or straight trajectory; rather it appears that everything is tried and retried at some point. For instance, it may make sense to start off with

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S/2009/189 (April 8, 2009), <http://www.unhcr.org/refworld/docid/49e6f2880.html>; Teresa Whitfield, *Orchestrating International Action*, 19 ACCORD 18 (2008), [http://www.c-r.org/sites/c-r.org/files/accord%2019\\_4Orchestrating%20international%20action\\_2008\\_ENG.pdf](http://www.c-r.org/sites/c-r.org/files/accord%2019_4Orchestrating%20international%20action_2008_ENG.pdf).

<sup>11</sup> Böhmelt, *supra* note 10; Heldt, *supra* note 10; David Cunningham, *Veto Players and Civil War Duration*, 50 AM. J. POL. SCI. 875, 877, 879 (2006).

<sup>12</sup> TERESA WHITFIELD, FRIENDS INDEED? THE UNITED NATIONS, GROUPS OF FRIENDS, AND THE RESOLUTION OF CONFLICT 270, 280 (2007).

<sup>13</sup> See Heldt, *supra* note 7, at 6.

<sup>14</sup> According to a private conversation with a high-level diplomat who was involved in Balkans peacemaking, this lack of coordination or even competition was a huge problem for peacemaking in the Balkans. There is a large debate as to the merits of sequencing peacemaking tools and negotiation issues: how sequencing should be carried out, what tools to use, what issues to deal with and in what order. See Heldt, *supra* note 7 (providing a brief literature overview).

“other issues,” and over time move towards the more difficult or core matters instead of moving back and forth again and again.<sup>15</sup> This disorder and plethora of peacemaking attempts makes it difficult to understand how one peacemaking attempt can build on previous attempts, or even how the conflict actors themselves can keep up with the process. This is especially because peacemaking attempts have different start dates, and sometimes overlap. It is not implausible that this peacemaking pattern prolonged the conflict, which in the end was solved on the battlefield instead of through negotiations.

Other extreme cases for the period of 1993-2004 involving many third-parties and different mediation tools include: Burundi (late 1997-2003), Croatia (1995), Guinea Bissau (1998), Israel/Palestine (2000-2002), and the Ivory Coast (2002-2003).<sup>16</sup> It is possible to find examples of peacemaking, where the application of third-party tools and issues does not appear chaotic or inconsistent, even though there are many peacemaking attempts; however, such cases are rare.

An inherent feature of such uncoordinated peacemaking processes is not simply a lack of institutional memory and consistency, but also an absence of learning. Third-party initiated peacemaking should, in theory, move the process forward by softening the parties, increasing mutual trust and negotiating skills, and providing information on fundamental issues that make parties more likely to spot zones of agreements.<sup>17</sup> Third parties also stand to learn from the process. However, since third parties change and are numerous in some cases, learning does not appear feasible: third parties usually do not engage for an extended period of time, and their lessons learned are not transferred to succeeding or competing third parties through debriefings. This may partly explain the lack of

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<sup>15</sup> *Id.*

<sup>16</sup> Heldt, *supra* note 7, at 7.

<sup>17</sup> See generally Jacob Bercovitch & Scott Sigmund Gartner, *Is There a Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 32 INT'L INTERACTIONS 329, 330 (2006); J. Michael Greig & Paul F. Diehl, *Softening Up: Making Conflicts More Amenable to Diplomacy*, 32 INT'L INTERACTIONS 355, 377-378 (2006); Heldt, *supra* note 7, at 8.

peacemaking consistency and continuity in some cases, and the general lack of progress. It also illustrates how potentially damaging the lack of long-term engagement by lead peacemakers can be in individual cases.

TOWARDS MORE COORDINATION,  
AND MORE PEACEMAKING

Just as scholars and practitioners think in terms of the steps to war, it may be useful to apply a similar concept and think in terms of steps to peace. Steps to peace “implies that early efforts may, or perhaps even should, fail to generate a breakthrough, but they will [ideally] inch the process forward, in a productive way such that the next mediation attempt can build upon” earlier efforts.<sup>18</sup> It implies also that quick breakthroughs—or rapid progress—will be the exception rather than the rule, and thus will be time-consuming. Meanwhile, during the period 1993-2004, about one third of the emerging conflicts escalated to war, and all but five of the cases escalating did so within two calendar years.<sup>19</sup> The same data also shows that if a conflict avoids escalation in the immediate term, it is unlikely it will escalate in the future. This pattern may be due to the most war-prone cases escalating right away, thereby leaving the less war-prone cases behind; or that peacemaking efforts start to bite—or are perhaps usually only initiated—after some period of time. However, since low-level conflicts that escalate to war almost always do so within a 24-month period, time *is* of the essence. There is no time for many cumulative peacemaking attempts or steps to peace, not least since peacemaking attempts require time-consuming preparations. Coordination must ideally be at hand from the very beginning.

Strategic coordination tools such as ad hoc Groups of Friends, contact groups, friends of a country, and implementation

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<sup>18</sup> Heldt, *supra* note 7, at 2, 3, 9; Scott Sigmund Gartner, *Civil War Peacemaking*, in PEACE AND CONFLICT 2012: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY 71, 83 (J. Joseph Hewitt et al. eds., 2012).

<sup>19</sup> For data see Lotta Harbom, *States in Armed Conflict 2006*, in UPPSALA UNIVERSITY DEPARTMENT OF PEACE AND RESEARCH REPORT 79 (2007).



group approaches, have different strengths and weaknesses.<sup>20</sup> They emerged as novel strategic level peacemaking coordination mechanisms in the early 1990s and are now widely used with the goal of achieving strategic level coherence and coordination of peacemaking in protracted armed conflicts. The focus in this article is, however, on emerging cases, where coordination mechanisms such as Groups of Friends are rarely used, probably because emerging intrastate conflicts do not elicit much international interest. It may therefore be necessary to consider other solutions which involve a system or template for coordination that will not only work from the very first day of an emerging conflict, but also makes peacemaking more prevalent.

One policy implication is that policymakers need to have a long-term strategy to address the coordination problem, part of which is to limit the number of peacemakers in a given conflict. A second policy implication is not to let initial failures (or non-successes) discourage further peacemaking. Policymakers need to have a long-term view of the process, and carry out the process in a strategic manner. To paraphrase Sheri Rosenberg,<sup>21</sup> peacemaking is a process, not an event. Unsuccessful initial mediations build a foundation for subsequent peacemaking attempts. Research suggests that it is not sufficient to simply do the right thing; it has to be done in a certain order, and repeatedly. One far-reaching vision involves not only the creation of a predetermined division of labor, but preferably also a predetermined third party that (with the support of the international community) takes the overall responsibility for an individual emerging conflict. The U.N. and some IGOs appear to be the only viable and legitimate actors to assume such regional or sub-regional responsibilities. Admittedly, such ideal planning would in practice be difficult to achieve in some regions and sub-regions of the world (especially in Africa and Asia) because of (sub-) regional rivalries and unresolved disputes, and because of vested interests in

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<sup>20</sup> See generally Prantl, *supra* note 1; TERESA WHITFIELD, EXTERNAL ACTORS IN MEDIATION: DILEMMAS & OPTIONS FOR MEDIATORS 18 (2010); WHITFIELD, *supra* note 12; Whitfield, *supra* note 10, at 20-21; TERESA WHITFIELD, WORKING WITH GROUPS OF FRIENDS (2010).

<sup>21</sup> Sheri R. Rosenberg, *Genocide is a Process, Not an Event*, 7 GENOCIDE STUD. & PREVENTION 16 (2012).

the conflicts among some countries. Moreover, this approach would invalidate anything but so-called Track 1 diplomacy, which involves official government figures, and thus involves a return to the pattern of the centralised peacemaking that existed before the 1990s. At the same time this approach would increase the number of overall peacemaking attempts. In short, the approach involves fewer but more coordinated actors, not less peacemaking. The present pattern of peacemaking does not appear to be productive; a change is necessary.

The international community, under the leadership of the U.N., has achieved a high degree of coordination in the areas of peacekeeping and peacebuilding, so there may already be templates for how to improve coordination in the area of peacemaking. However, peacekeeping is easier to coordinate. Given the high costs and manpower required, there are fewer potential peacekeeping actors. There is moreover no competition or out-bidding among these potential actors, and in those cases where several actors carry out peacekeeping simultaneously (e.g., Kosovo), there is close coordination and a clear division of labor. Peacemaking is the exact opposite of this scenario and a need exists to develop new methods to deal with this issue.

A further policy implication is that efforts to improve coordination should not crowd out the fact that most emerging conflicts are left totally or partially “orphaned,” in that there are no or few outside peacemaking attempts.<sup>22</sup> Only a handful of cases suffer from over-attention. Efforts to improve coordination should thus not lose sight of the need for more peacemaking, which in fact may be a bigger problem than the lack of coordination in a few select cases.

On a final policy note, regardless of which is the most pressing issue, they all may be closely linked, in that closer attention to coordination issues may serve to strengthen the culture of prevention and peacemaking. A synergy effect may thus be at hand.

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<sup>22</sup> Fen O. Hampson, *Preventive Diplomacy at the United Nations and Beyond*, in FROM REACTION TO CONFLICT PREVENTION: OPPORTUNITIES FOR THE UN SYSTEM 139, 148-152 (Fen O. Hampson & David Malone eds., 1996).

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## RESEARCH ON BIAS IN MEDIATION: POLICY IMPLICATIONS

*Isak Svensson\**

### INTRODUCTION

One of the most important and disputed questions within the field of international mediation concerns the issue of *bias*. Can mediators be partial, sympathetic and supportive of one but not both of the main disputants, or should mediators always be neutral? Is it possible to be strictly impartial? Although neutrality is only one aspect of the mediators' characteristics important to bringing about peaceful settlement of violent disputes, the question of bias cuts to the core of what mediation is and the ways in which mediators can help the parties reach peace. It is therefore crucial for academics and researchers, as well as policymakers and practitioners, to understand the occurrence, function, and effect of mediators' bias in international conflict resolution processes.

Summarizing the growing field of mediation research, Tom Woodhouse states:

[a]s the literature on mediation has grown, and as knowledge has increased from an accumulating base of case studies and reflections, one of the most significant questions which has emerged is that related

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to the relative merits . . . between two contrasting types of mediation: firstly that of a biased mediator . . . and secondly that of the unbiased mediator.<sup>1</sup>

Yet, the issue of bias in international mediation is a complex one: a simple yes-or-no-answer to the question of whether mediators should be biased or neutral is not sufficient. It depends on a set of circumstances, which are discussed in this article. The question of mediation and bias is a core discussion within international mediation research.<sup>2</sup> This article does not aim to summarize this rich research field, nor even explicitly situate my own work within this larger field. Its more limited ambition is instead to draw out the policy implications of my own empirically-based work on the role of bias in the mediation of internal armed conflicts.<sup>3</sup> My main contribution to mediation research has been to explore the role of neutrality and bias in international peace diplomacy in civil wars.

A first basic question to pose is whether mediators can be biased. If they are biased, do they not cease to be mediators? It is a common perception that mediation requires unbiased third parties. Some scholarly definitions require impartiality of the mediators, and hence, mediators are unbiased by definition. For instance, a classical

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<sup>1</sup> Tom Woodhouse, *Adam Curle: Radical Peacemaker and Pioneer of Peace Studies*, 1 J. OF CONFLICTOLOGY 1, 5-6 (2010).

<sup>2</sup> See generally I. WILLIAM ZARTMAN, *ELUSIVE PEACE: NEGOTIATING AN END TO CIVIL WARS* 2-29 (1995); I. William Zartman & Saadia Touval, *International Mediation*, in *LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD* 437-454 (Chester A. Crocker et al. eds., 2007); Saadia Touval, *Biased Intermediaries: Theoretical and Historical Considerations*, 1 JERUSALEM J. OF INT'L REL. 51 (1975); Bernd Beber, *International Mediation, Selection Effects, and the Question of Bias*, 29 CONFLICT MGMT. AND PEACE SCI. 397 (2012); Andrew Kydd, *Which Side Are You On? Bias, Credibility, and Mediation*, 47 AM. J. OF POL. SCI. 597 (2003); Burcu Savun, *Information, Bias, and Mediation Success*, 52 INT'L STUD. Q. 25 (2008).

<sup>3</sup> For work on bias in international conflicts, see generally Christopher Gelpi, *Alliances as Instruments of Intra-Allied Control*, in *IMPERFECT UNIONS: SECURITY INSTITUTIONS OVER TIME AND SPACE* 107 (Helga Haftendorn et al. eds., 1999); Stephen E. Gent & Megan Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, 28 CONFLICT MGMT. & PEACE SCI. 124 (2011). See also Stephen E. Gent, [The Politics of International Arbitration and Adjudication](#), 2 PENN ST. J.L. & INT'L AFF. 66 (2013).

definition of mediation suggests that mediators have a relatively “impartial stance with regard to the opposing sides in a crisis.”<sup>4</sup> Thus, by definition, impartiality is conceptually linked to mediation. Yet, with a definitional approach such as this, it is not possible to examine the extent to which bias helps or hinders peace processes. A more fruitful approach is to leave the question of bias as an open empirical question: to use mediator’s bias as an explanatory factor—that is, the degree and type of bias—and examine empirically the relationship between bias and how the process unfolds and the outcome is impacted.

#### BIAS—AND ITS DIRECTION—MATTERS

My research has shown that biased mediators, in some situations, outperform neutral mediators. Yet, in order to understand the role of bias in mediation, we first need to understand the context of contemporary armed conflicts. Most contemporary armed conflicts are fought between governments and rebel-groups.<sup>5</sup> In other words, they are *intrastate* armed conflicts. Yet, until very recently, statistical analysis on mediation focused almost exclusively on *interstate* conflicts. Government and rebel-groups are different types of actors, a fact that implies that mediation plays a different type of role than in interstate conflicts, for the following basic reason: the government is internationally recognized, stronger in terms of capabilities and military might, and has many other obligations beyond pursuing a conflict with rebel groups. By contrast, rebel-groups typically are unrecognized (and strive for recognition), materially weaker, but exclusively focused on achieving their aspirations in the conflict with the government-side.

This also means that a mediator’s bias plays a different role depending on whether it is directed towards rebels or governments. I have suggested that there is a *rebel-sided commitment problem*, meaning that governments may fear giving recognition and power to rebels due to a belief that they will misuse it and exploit their advantaged

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<sup>4</sup> ORAN R. YOUNG, *THE INTERMEDIARIES: THIRD PARTIES IN INTERNATIONAL CRISES* 52 (1967).

<sup>5</sup> See generally PETER WALLENSTEEN, *UNDERSTANDING CONFLICT RESOLUTION* (2011).

positions. This commitment problem occurs primarily when parties are about to conclude negotiated peace deals (as opposed to that which occurs primarily in the implementation phase of agreements).<sup>6</sup> A negotiated settlement implies asymmetric opportunities for exploitation on the rebel-side, and rebel-groups therefore have commitment problems. They can, however, mitigate these problems by accepting a mediator that is biased for the other (government) side. In support of this reasoning, I found empirically—exploring data on mediation in internal armed conflicts during the time-period 1989-2003—that government-biased mediators are particularly effective as peacemakers in bringing about negotiated settlements to armed conflicts.<sup>7</sup>

Yet, not all peace settlements are the same and therefore should not be treated alike. Instead, peace settlements should be disaggregated into different peace institutional arrangements. When policymakers engage in crafting peace agreements, they need to ask themselves what type of peace they aspire to reach. Different types of mediators are associated with different types of institutional arrangements. I have found that rebel-biased mediators tend, in comparison with neutral mediators, to create peace settlements that include political-power sharing arrangements and third-party security guarantees. In contrast, government-biased mediators are more likely to create stipulations for government-sided amnesties, and territorial power-sharing arrangements.

Furthermore, I argue that because biased mediators have incentives to protect their protégés, they will ensure that there are stronger mechanisms in the peace agreements. Exploring the content of all peace agreements since 1989, it becomes evident that biased mediators actually outperform neutral mediators in bringing about important institutional peace arrangements, such as stipulations for power-sharing, repatriation of civilians, and third-party security guarantees.<sup>8</sup> This insight is important because it shows that biased

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<sup>6</sup> See BARBARA F. WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS 67 (2002).

<sup>7</sup> Isak Svensson, *Bargaining, Bias and Peace Brokers: How Rebels Commit to Peace*, 44 J. OF PEACE RES. 177, 183-85 (2007).

<sup>8</sup> *Id.* at 185, 187.

mediators are not only more likely to be successful in bringing about settlements, but also in some sense, produce “better” agreements.<sup>9</sup>

Finally, it is also important to understand what makes biased third parties so effective. In previous work, I have identified four mechanisms that help explain the effectiveness of biased mediators: biased mediators can act (1) to protect their side, (2) reveal information, (3) deliver their side, and (4) counterbalance concession cheating.<sup>10</sup>

This article calls into question some of the underlying assumptions in the contemporary international approach to conflict resolution. When it comes to the quality of peace, there is a difference between biased and neutral mediators. If we define quality in terms of stipulations of institutional arrangements that previous research has identified as important for deals to stick and peace to become durable, then biased mediators tend to be more effective in bringing high-quality agreements about.<sup>11</sup>

One important, but insufficiently scrutinized issue regards the tension between justice-norms and peace-norms when it comes to biased and neutral mediators. Government-biased mediators tend to mediate agreements giving the government side freedom from persecution. This is good in the sense that it decreases the cost of peace for the belligerents—it is easier for decision-makers to agree to settle the conflict if they think they will not be punished for their wrongdoing during the war—and thereby make peace more likely to stick. Yet, it can also have a negative effect in the sense that it creates a culture of impunity by letting human-rights abusers go free. Biased mediators—under some circumstances—can be effective peace brokers, but their intervention may have negative implications for the values and protection of human rights.

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<sup>9</sup> Isak Svensson, *Who Brings Which Peace?: Neutral versus Biased Mediation and Institutional Peace Arrangements in Civil Wars*, 53 J. OF CONFLICT RESOL. 446, 449, 464-65 (2009).

<sup>10</sup> *Id.* at 463.

<sup>11</sup> *Id.* at 461-62.

The policy implication of these global, comparative studies is that the direction of bias matters. When selecting mediators to negotiate a conflict assignment, policymakers must pay attention to which side a potential mediator has supported. In general, government-sided mediators outperform rebel-sided in terms of bringing about negotiated settlement,<sup>12</sup> but to some extent (for instance, when it comes to political power-sharing and third-party security guarantees), it is the rebel-biased mediators that outperform government-biased ones.<sup>13</sup>

#### THE ROLE FOR NEUTRAL MEDIATORS

What then is the role for neutral mediators in peacemaking processes? Here four clarifications need to be made. First, although biased mediators, on an aggregate level, tend to be more effective than neutral ones, this does not necessarily mean that neutral mediators are unimportant. As with all social sciences, we are talking about probabilistic tendencies rather than general empirical laws. Neutral mediators are associated with negotiated settlements and can therefore also be important. Although they may bring agreements of less quality, they are nevertheless also engaged in bringing about negotiated settlements. Nothing we have concluded so far should lead us to disregard the role of neutral mediators.

Second, there are transformations that need to occur in a peace process in addition to the peace agreements, and neutral mediators may be better positioned to support the creation of such transformations. It can be seen as a success to “just” get negotiations started.<sup>14</sup>

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<sup>12</sup> Svensson, *supra* note 7 at 181-83.

<sup>13</sup> Svensson, *supra* note 9 at 463-64; *see also* Molly M. Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 INT’L INTERACTIONS 249 *passim* (2009) (discussing how historical ties also help explain the occurrence of mediation, which plays out differently in international and intrastate settings).

<sup>14</sup> ISAK SVENSSON & PETER WALLENSTEEN, *THE GO BETWEEN: JAN ELIASSON AND THE STYLES OF MEDIATION* 56, 67-68 (2010).



Third, coalitions of biased and neutral mediators can be an effective design for peacemaking. The presence of third-party bias among any of the mediators as the critical value for defining a mediator as either biased or neutral implies that neutral mediators sometimes work in conjecture with biased ones, and in such collaborations might be particularly effective.

Fourth, an important role for neutral mediators can be to bring on board potential mediators that will be biased due to their historical ties to one side, during the mediation process. For example, most informed observers would agree that peace between Israel and Palestine cannot be reached unless the U.S. engages as a peace broker. In fact, any progress that has been made in moving the parties' positions towards each other has been made under American auspices. Sweden played an important role in the late 1980s in bringing about U.S. engagement in the process, by mediating, not between the primary parties, but between the secondary supporting actors to the government-side (the U.S.) and the rebel-side (the Palestine Liberation Organization). The Swedish approach—neutral mediation between the main secondary supporting actors—transformed the U.S. engagement from support to peace-maker and thus structurally changed the relationships between the primary conflicting parties. This is in contrast to the direct engagement approach employed by the Norwegians in the same dispute—the Oslo Channel. The Norwegian approach was designed to engage directly with the primary parties, and although it reached a breakthrough and created a Palestinian Authority, it did not succeed in changing the underlying dynamics of the conflict. Rather, and perhaps counter-intuitively, many now view the Swedish approach as a more long-lasting achievement.

#### INSIDER-PARTIAL MEDIATORS

Another important policy implication to be drawn from the empirical research on mediation is the role of *internal* mediators: mediators emerged in the context of the conflicts and that culturally and positionally cannot be seen as strictly neutral. Domestic resources for peacemaking can be pivotal in peace processes. Most of the global, comparative research that has been done in the field of

mediation has focused on *international* mediators. Yet, mediators can also be insiders. Although Paul Wehr and John Paul Lederach point this out in an important 1991 piece, surprisingly little systematic research has heeded their advice and included these types of peace-actors in their analyses.<sup>15</sup> Insiders commonly carry with them certain distinct resources, which can provide important advantages in peace processes.

These insiders, I suggest, can be particularly useful in mitigating some of the informational problems that arise in conflict bargaining situations. Most notably: (1) insiders have access to information about the parties' resolve and capability to an extent that outsiders would have difficulty obtaining; and (2) insiders have significant reputation concerns as they will continue to interact with the conflicting parties after the intervention whereas outsiders often leave the scene after their intervention. Given this proximity, insiders need to be more protective of their reputations, and can ill-afford to lie, bluff or misrepresent information to the parties. Their concern for their future reputation incentivizes them to be candid during talks.

These factors should lead us to examine other types of third parties than those usually discussed in the literature. In particular, we need to explore the role of insiders such as religious representatives and civil society leaders in acting as peacemakers. An empirical analysis of the role of insiders shows that insiders increase the chance of reaching the conclusion of a negotiated settlement—but overall they tend to select the “easiest” conflict situations available.<sup>16</sup> Studies along these lines have important policy ramifications, not least by underlining the need for developing domestic resources for peacemaking.

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<sup>15</sup> See generally Paul Wehr & John Paul Lederach, *Mediating Conflict in Central America*, 28 J. PEACE RES. 85 (1991).

<sup>16</sup> Svensson, *supra* note 7.

## PERCEPTIONS OF PARTIALITY

To this point, bias has been discussed in terms of objective criteria: based on previous behavior (secondary support in terms of international mediators) or the mediator's location within the conflict (insiders in non-armed conflicts). Yet, there are also subjective aspects to bias. How do parties in conflicts *perceive* the third-party mediators? Why are strictly neutral mediators sometimes perceived as biased? Intrastate armed conflicts involve parties that are not necessarily equally strong or share the same level of international recognition. They are, in other words, asymmetric in nature. Mediators that try to mediate in such an asymmetric context run the risk of becoming trapped in the dynamics and will commonly have problems appearing neutral. This is a dilemma that mediators of civil wars often face. Trying to act in an even-handed fashion will risk undermining the weaker side in the negotiations. On the other hand, trying to equalize the parties (thereby enabling a more productive peace process) runs the risk of having the mediators be perceived as coming out in support of one side of a conflict. Either way, the mediator risks being perceived as partial. Norway's engagement in Sri Lanka is illustrative of this problem. By supporting the peace infrastructure of the Tamil Tigers organization, which was necessary for effective transformation of the conflict, Norway was perceived as more partial to the rebel-group than the Sinhalese majority.<sup>17</sup>

## POLICY IMPLICATIONS

Given the insights generated by the research on bias in mediation, what are the implications for policymakers? What are the policy lessons that can be drawn from this research?

Three basic policy implications stand out. First, mediators with ties and a history of support to one side can play a valuable role in the process of negotiating peace in intrastate armed conflicts. Biased mediators have an important function, particularly when

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<sup>17</sup> Kristine Höglund & Isak Svensson, *Damned if You Do, and Damned if You Don't: Nordic Involvement and Images of Third-Party Neutrality in Sri Lanka*, 13 INT'L NEGOTIATION 341, 351 (2008).

getting conflicting parties to agree to concessions on the basic incompatible issues at the core of the conflict.

Secondly, and more specifically, the direction of the bias matters: rebel-biased and government-biased mediators have different functions to play in intrastate peacemaking processes. Stipulations of particular peace institutional arrangements are associated with different types of biased mediators.

This point also leads to a last general policy insight: the importance of a more disaggregated perspective on mediation outcome. Since peace agreements vary considerably in their content, policy must go beyond merely trying to get the parties to reach an agreement—it also matters what kind of agreement is reached.

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## DECEPTIVE RESULTS: WHY MEDIATION APPEARS TO FAIL BUT ACTUALLY SUCCEEDS

*Scott Sigmund Gartner\**

### INTRODUCTION

Mediation is one of the most prevalent and commonly touted forms of international conflict management.<sup>1</sup> Yet, compared to other forms of peacemaking such as bilateral negotiation, international disputes that receive mediation are less likely to result in peace agreements, and mediated agreements are more likely to fail.<sup>2</sup> Furthermore, data seem to suggest the opposite of what is commonly believed about specific types of mediation.<sup>3</sup> For example, scholars and policymakers frequently champion civil war mediation by regional governmental organizations.<sup>4</sup> Yet, more than half of all civil war peace agreements reached through regional governmental organization mediation fail *in less than a week*.<sup>5</sup> Assessing a wide array

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<sup>1</sup> Jacob Bercovitch & Scott Sigmund Gartner, *Is There Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 34 INT'L INTERACTIONS 329, 330 (2006).

<sup>2</sup> See *id.* at 342.

<sup>3</sup> See Scott Sigmund Gartner, *Signs of Trouble: Regional Organization Mediation and Civil War Agreement Durability*, 73 J. POL. 380, 380 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 380, 387-88.

of factors affecting civil war peacemaking, regional organization mediation is *the best predictor of agreement failure*.<sup>6</sup>

Why does mediation seem to have such poor results? It is a problem of deceptive appearances. A concept called “selection effects” exerts powerful negative influences on what we observe; ostensibly suggesting that mediation in general—and regional governmental organization mediation in particular—produce poor conflict management outcomes. In reality, appearances deceive; both mediation overall, and regional governmental organization mediation in particular, effectively lead to peace.

## MEDIATION

Two aspects of international dispute mediation are critical for understanding these deceptive results: (1) participation in mediation and adherence to mediated outcomes is voluntary; and (2) mediation is costly.

### A. Voluntary

International dispute mediation is a completely voluntary process—no judge can order belligerents or a third-party mediator to participate. The third-party mediator must be willing to offer assistance, and the belligerents must be willing on their own accord to accept the third party’s offer to mediate.<sup>7</sup> Unlike binding arbitration, mediation does not require a commitment in advance to accept an outcome. Adherence to a settlement reached through mediation requires the voluntary agreement of the disputants.

### B. Costs

Mediation costs are “considerable.”<sup>8</sup> The costs of mediation vary with the type of actor. For example, in a civil war, governments

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<sup>6</sup> *Id.* at 387-88.

<sup>7</sup> Molly M. Melin, Scott Sigmund Gartner & Jacob Bercovitch, *Fear of Rejection: The Puzzle of Unaccepted Mediation Offers in International Conflict*, CONFLICT MGMT. & PEACE SCI. (forthcoming 2013).

<sup>8</sup> KYLE BEARDSLEY, THE MEDIATION DILEMMA 22 (2011).

take a dim view of appearing to increase the stature of insurgents by sitting with them as apparent equals at the peacemaking table.<sup>9</sup> Insurgents might be concerned that they lack any control over mediation outcomes given their power asymmetry with a standing government.<sup>10</sup> Mediators' costs include: (1) forgoing other peace efforts; (2) damage to reputation from failure; (3) political costs; and, (4) operational expenses.<sup>11</sup> Belligerents look at the human, economic, and diplomatic costs of additional violence, their likelihood of victory, and the various costs of mediation when considering conflict resolution.

The voluntary and costly attributes of mediation combine to create powerful *process* and *selection* effects—dynamics essential for understanding mediation outcomes.

#### PROCESS AND SELECTION EFFECTS

The distinction between process and selection effects represents a critical innovation in studies of dispute resolution.<sup>12</sup> Mediators can choose among a wide variety of tools when working to resolve disputes.<sup>13</sup>

Process Effects. Process effects reflect choices made during conflict management that *directly influence* outcomes, such as mediator

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<sup>9</sup> Molly M. Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 INT'L INTERACTIONS 249, 254 (2009).

<sup>10</sup> BEARDSLEY, *supra* note 8, at 154.

<sup>11</sup> Leslie G. Terris & Zeev Maoz, *Rational Mediation: A Theory and a Test*, 42 J. PEACE RES. 563, 563-83 (2005). *See generally* Jacob Bercovitch & Gerald Schneider, *Who Mediates? The Political Economy of International Conflict Management*, 37 J. PEACE RES. 145, 145-65 (2000).

<sup>12</sup> *See* Scott Sigmund Gartner & Jacob Bercovitch, *Overcoming Obstacles to Peace: The Contribution of Mediation to Short-Lived Conflict Settlements*, 50 INT'L STUD. Q. 819, 820, 822, 835-36 (2006).

<sup>13</sup> *See* Kyle Beardsley, [Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution](#), 2 PENN ST. J.L. & INT'L AFF. 57 (2013); Molly M. Melin, [When States Mediate](#), 2 PENN ST. J.L. & INT'L AFF. 78 (2013); Stephen E. Gent, [The Politics of International Arbitration and Adjudication](#), 2 PENN ST. J.L. & INT'L AFF. 66 (2013) (explaining how similar types of choices also affect other dispute resolution methods, such as arbitration and adjudication).

strategy. For example, during the negotiations with Egyptian President Sadat and Israeli Prime Minister Begin, U.S. President Jimmy Carter guaranteed U.S. funding for military bases to both countries, a move that greatly contributed to the successful Camp David Peace Accords. Carter's guaranty is an example of a process effect—an action that directly influences the mediation outcome. Process effects have a clear, causal effect on conflict management results—they shape dispute resolution success and failure.

Selection Effects. Selection effects identify specific populations of cases that have particular conflict management traits. For example, imagine there are two types of disputes: *hard* (difficult to resolve) and *easy* (open to resolution). Difficult to resolve disputes typically involve higher levels of violence, greater stakes and more intransigent belligerents than easy to resolve disputes. While a great mediator might achieve success in a hard dispute and a poor mediator may fail to settle an easily resolvable dispute, on average, hard disputes are less likely to result in peacemaking success than easy ones. Thus, identifying the dispute's type (hard or easy) helps to predict the likely outcome of any conflict resolution. Selection effects identify a dispute's type. They distinguish the population to which disputes belong; but unlike process effects, they do not directly affect the conflict management process. Rather, selection effects signal the conflict's likely type and thus its odds of a peaceful outcome.<sup>14</sup>

The difference between selection and process effects can be illustrated by comparing a student clinic and university hospital.<sup>15</sup> The clinic refers serious cases to the hospital. The hospital treats the high risk cases—those with a greater chance of resulting in a fatality (*selection effect*). The hospital has superior medical resources and provides better treatment (*process effect*). Given a serious illness, students go to the hospital, even if its mortality rates are higher. Students thus take into account (likely without thinking about it)

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<sup>14</sup> Scott Sigmund Gartner & Molly M. Melin, *Assessing Outcomes: Conflict Management and the Durability of Peace*, in THE SAGE HANDBOOK ON CONFLICT RESOLUTION 564, 564-79 (Jacob Bercovitch et al. eds., 2009).

<sup>15</sup> This example is drawn from Scott Sigmund Gartner & Aimee A. Tannehill, *Negotiating with the Dragon: The People's Republic of China and International Dispute Settlement Duration*, 12 TAMKANG J. INT'L AFF. 69, 69-99 (2008) (Taiwan).



selection effects; they recognize that the population of patients at the hospital is sicker and more likely to die than the population of patients at the clinic. Without consideration of the influence of selection, one would erroneously determine that the life-saving abilities of the clinic are superior to that of the hospital, when in fact the opposite is true.<sup>16</sup>

#### SELECTION EFFECTS AND MEDIATION

Because mediation is costly, belligerents try to avoid it. Disputants who talk between themselves and resolve their differences on their own do not have to bear the costs of mediation. Thus, bilateral negotiation between disputants represents the most efficient, low cost, conflict resolution mechanism. If bilateral negotiations fail or their differences make them unwilling to work together (for example, Sadat and Begin refused to be together in the same room after their first meeting at Camp David), then disputants who want a peaceful resolution process can turn to a third-party mediator. As a result, mediators work on tougher cases than those bilaterally negotiated; disputes that, as a result of the selection process, are less likely to result in peace. Mediation itself, however, has positive process effects. An identical dispute would be more likely to result in peace if it is mediated than if it is not. But in reality, disputes are not distributed randomly or evenly, among conflict resolution processes—mediators get the hardest cases, which are more likely to result in peacemaking failure.

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<sup>16</sup> Cf. Lori Guevara, Cassia Spohn & Denise Herz, *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344, 344-45, 347-48, 366 (2004). Selection effects commonly manifest in legal contexts. For example, juvenile defendants who are not defended by a lawyer are *more* likely to have their charges dismissed and *less* likely to receive a secure confinement disposition than youth who retain lawyers. A defendant's lawyer does not have a negative effect on the case's outcome; rather, declining counsel signals a low likelihood of conviction and a low stakes case—selection effects. *Id.*; see also Michael Alexander Roach, *Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects Essays on Heterogeneous Treatments of Defendants within Legal Institutions* (June 2011) (unpublished Ph.D. dissertation, Northwestern University).

When the nature of the dispute is taken into account, analyses show that international dispute mediation has a positive process effect on reaching durable agreements.<sup>17</sup>

#### SELECTION EFFECTS AND REGIONAL GOVERNMENTAL ORGANIZATIONS

One way to develop a better understanding of how mediation exerts deceptive selection effects is to look at a specific type of mediation. For example, consider civil war mediation by regional governmental organizations. The Organization of American States, The African Union, and The Arab League represent examples of regional governmental organizations. Today, “regional organizations are the most common type of IOs [International Organizations] in the world system.”<sup>18</sup> As the number of regional organizations has increased, so has their role in conflict management, and specifically as mediators. Comparing the periods shortly before and after 1980, the frequency of regional mediation almost doubled.<sup>19</sup>

This increase is not surprising given widespread beliefs that regional organizations represent the ideal mediator type.<sup>20</sup> These beliefs draw on four core arguments. First, regional organization member states frequently share political, economic, social, and cultural features with the disputants. Bercovitch and Houston argue that regional organizations are more likely to achieve conflict resolution outcomes than other types of mediators because they, “mediate within the same cultural and value system—and this, it seems, promotes agreement more than any other factor.”<sup>21</sup> United

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<sup>17</sup> See Gartner & Bercovitch, *supra* note 12, at 822-23.

<sup>18</sup> Jon C. Pevehouse, *With a Little Help from My Friends? Regional Organizations and the Consolidation of Democracy*, 46 AM. J. POL. SCI. 611, 616 (2002).

<sup>19</sup> See Scott Sigmund Gartner, *Civil War Peacemaking*, in PEACE AND CONFLICT 2012 71-84 (J. Joseph Hewitt et al. eds., 2012).

<sup>20</sup> See T.H.Y. Nguyen, *Beyond Good Offices? The Role of Regional Organizations in Conflict Resolution*, 55 J. INT'L AFF. 463, 484 (2002).

<sup>21</sup> Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 11, 27 (Jacob Bercovitch ed., 1995) (stating a counter to this argument, however, is that regional organizations often contain their own super or regional powers with super or regional interests that can

Nations Security Council Resolution 1809 states, “regional organizations are well positioned to understand the root causes of armed conflicts owing to their knowledge of the region which can be a benefit for their efforts to influence the prevention or resolution of these conflicts”<sup>22</sup> Second, neighboring states have a greater stake in peacemaking than outsider states or the U.N. and “must live with the consequences of their work,” which generates higher levels of commitment and trust.<sup>23</sup> Third, disputants are less likely to view mediation offers from regional governmental organizations as stealth colonization efforts. Finally, regional governmental organization charters frequently encourage third-party peacemaking, making them willing mediators. For example, Article 84 of The Charter of the Organization of American States directs the Permanent Council to assist members in the “peaceful settlement of their disputes.”<sup>24</sup> For example, the OAS successfully mediated the Belize-Guatemala conflict in 2000—a dispute originating from the independence of Spain in 1839 and which the U.N. failed to resolve.<sup>25</sup>

There are also aspects of regional organization conflict mediation that are unattractive to belligerents. Given the inherent advantages of a sitting government, insurgent success in civil war requires support from neighboring states.<sup>26</sup> The comparatively small

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skew mediation. For example, consider the roles of: Nigeria in The African Union, Egypt in The Arab League, and the U.S. in The Organization of American States).

<sup>22</sup> S.C. Res. 1806, U.N. SCOR, 63rd Year, U.N. Doc. S/RES/1809, at 1 (Apr. 16, 2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCE9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Coop%20w%20Reg%20Orgs%20SRES1809.pdf>.

<sup>23</sup> John Paul Lederach & Paul Wehr, *Mediating Conflict in Central America*, 28 J. PEACE RES. 85, 97 (1991). See also Marie Olson & Frederic S. Pearson, *Civil War Characteristics, Mediators, and Resolution*, 19 CONFLICT RESOL. Q. 421 (2002).

<sup>24</sup> The Protocol of Amendment to the Charter of the Organization of American States, “Protocol of Buenos Aires” art. 84, Feb. 27 1967, 21 U.S.T. 607, 721 U.N.T.S. 324, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.pdf](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf).

<sup>25</sup> MONSTERRAT GORINA-YSERN, AM. SOC’Y OF INT’L LAW, OAS MEDIATES IN BELIZE-GUATEMALA BORDER DISPUTE (2000), <http://www.asil.org/insigh59.cfm>.

<sup>26</sup> Dylan Balch-Lindsey, Andrew J. Enterline & Kyle A. Joyce, *Third-Party Intervention and the Civil War Process*, 45 J. PEACE RES. 345, 345 (2008); Salehyan Idean, *No Shelter Here: Rebel Sanctuaries and International Conflict*, 70 J. POL. 54 (2008).

size of regional groups ensures all members have influence, accentuating concerns over bias.<sup>27</sup> As a result, governments fighting civil wars abhor including regional organizations in dispute negotiations because it provides their insurgent's benefactors influence in the conflict management process. Similarly, rebels recognize that the government they threaten likely plays a major role in the regional organization. Additionally, some states in the organization likely have their own insurgency problems and thus want to come down hard on rebel groups in order to deter challenges at home.<sup>28</sup>

Given these disincentives, civil war belligerents prefer to avoid mediation by regional organizations and only select them in the most dire circumstances. As a result, regional organizations mediate particularly deadly and intractable civil wars—those less likely to result in durable peace agreements. When these selection effects are controlled for, however, and the intensity of civil wars are taken into account, mediation by regional organizations has a positive process effect on peacemaking.<sup>29</sup>

#### POLICY IMPLICATIONS

Just like the best hospitals get the sickest patients and lose the most lives, the best peacemakers get the most violent and intractable disputes that produce the worst peace outcomes. However, when we take into account the deadly nature and known difficulty of resolving those international disputes selected for mediation, we see that mediation generally, and mediation by regional organizations specifically, facilitate the creation of robust peace agreements.

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<sup>27</sup> See Isak Svensson, [Research on Bias in Mediation: Policy Implications](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

<sup>28</sup> See Navin A. Bapat, *The Internationalization of Terrorist Campaigns*, 24 CONFLICT MGMT. & PEACE SCI. 265 (2007). This problem is complicated further by the frequent shifting preference for violence among ethnic groups. See, e.g., Victor Asal & Jonathan Wilkenfeld, [Ethnic Conflict: An Organizational Perspective](#), 2 PENN ST. J.L. & INT'L AFF. 91 (2013).

<sup>29</sup> See Gartner, *supra* note 3.

Selection effects have two critical policy implications. First, selection influences how we should evaluate mediation failure. Some ineffective mediation is likely the result of poor mediators and weak peacemaking strategies. But other disappointing results, especially when generated by mediators and strategies thought to be highly effective, are likely misleading and result from selection effects. For example, the Camp David Accords mediated by President Carter in 1978 have led to a peace between Egypt and Israel that has lasted for more than thirty years—in contrast to the five wars fought between the two countries in the thirty years prior to the Accords. But the Accords did not bring comprehensive peace to the region. After Camp David, mediators found it difficult to make further progress in this dispute. The Oslo Accords between Israel and the Palestinians have not operated as effectively as the Camp David Accords. Some might claim that these other mediators lacked Carter's mediation skills. It is critical to remember, however, that the Arab-Israeli dispute remains extremely intractable. While the dispute's violence and salience help it to attract the best global mediators they also form the conditions that make peace elusive. It would be wrong to equate failure to obtain peace in these disputes with the failure of mediation generally or the ineffectiveness of any specific mediators. Rather, we need to keep in mind that the intractable, violent, and globally important nature of the Arab-Israeli dispute both attracts mediation and makes it difficult to resolve—an apt illustration of selection effects. Given that the top mediators get the toughest cases, it is vital that we keep selection in mind when evaluating mediation efficacy.

Second, potential mediators need to recognize that they face a trade-off. They can choose to mediate disputes that are likely to be resolved—but bilateral negotiations may work equally effectively in these disputes. Or, potential mediators can choose persistent disputes that are not likely to result in durable peace or civil wars that are especially challenging to resolve.<sup>30</sup> These are the disputes that most require third-party assistance—they are both the most violent and the least likely to be resolved through the independent actions of the

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<sup>30</sup> See David E. Cunningham, *Who Should Be At The Table? Veto Players and Peace Processes in the Civil War*, 2 PENN ST. J.L. INT'L AFF. 38 (2013); J. Michael Greig, *Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*, 2 PENN ST. J.L. INT'L AFF. 48 (2013).

disputants—but are also the disputes that are most likely to result in failed mediation outcomes. Resolving these more intractable disputes requires a frustrating pattern of peacemaking efforts.<sup>31</sup> Thus, mediators need to assess the value of mediation efforts based on the challenge of the task they face, not only on what they can achieve.

These perspectives should not, however, suggest pessimism about mediation and peacemaking. Mediation of previously persistent disputes does not necessarily result in failed peacemaking. For example, the Colombian government has battled the insurgent group FARC (Fuerzas Armadas Revolucionarias de Colombia) since 1964. On March 1, 2008, Colombia attacked a FARC encampment in Ecuador, expanding the war and enflaming a long-simmering regional dispute. Viewing the attack as an illegal violation of its sovereignty, Ecuador cut diplomatic ties with Colombia. Colombia accused the Ecuadorian and Venezuelan governments of financially supporting FARC. Tensions intensified when Ecuador and Venezuela sent troops to the Colombian border.<sup>32</sup> The OAS intervened rapidly to diffuse tensions by calling an emergency session and sending a commission to visit the countries and investigate the attack. The OAS determined that Colombia did in fact violate Ecuador's sovereignty and territorial integrity. Colombia issued an apology and the countries resumed diplomatic relations. The OAS launched the Mission of Good Offices in Colombia and Ecuador which works to maintain peaceful relations between the two countries.<sup>33</sup> Thus,

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<sup>31</sup> Birger Heldt, *The Lack of Coordination in Diplomatic Peacemaking*, 2 PENN ST. J.L. & INT'L AFF. 9 (2013).

<sup>32</sup> See *Neighbors Cut Ties With Colombia*, BBC NEWS, Mar. 4, 2008, <http://news.bbc.co.uk/2/hi/americas/7276228.stm>; Simon Romero, *Columbia is Flashpoint in Chavez's Feud with U.S.*, N.Y. TIMES, Mar. 5, 2008, <http://www.nytimes.com/2008/03/05/world/americas/05venez.html?pagewanted=all>; LAURA CARLSEN, FOREIGN POLICY IN FOCUS, THE ANDEAN CRISIS (John Feffer ed., 2008), [http://www.fpif.org/articles/the\\_andean\\_crisis](http://www.fpif.org/articles/the_andean_crisis).

<sup>33</sup> See *Columbia and Ecuador*, OAS PEACE FUND, <http://www.oas.org/sap/peacefund/ColombiaAndEcuador/> (last visited Apr. 10, 2013); *Crisis Deepens as Venezuela Closes Colombia Border*, AFP, Mar. 4, 2008, <http://afp.google.com/article/ALeqM5iWzEd06o1UoIdZxv17wkp18uz4g>; TATIANA WAISBERG, AM. SOC'Y OF INT'L LAW, COLUMBIA'S USE OF FORCE IN ECUADOR AGAINST A TERRORIST ORGANIZATION: INTERNATIONAL LAW AND THE USE OF FORCE AGAINST NON-STATE ACTORS (2008), [http://www.asil.org/insights080822.cfm#\\_edn1](http://www.asil.org/insights080822.cfm#_edn1).

despite an enduring dispute, a non-governmental actor and a violation of sovereignty—all factors known to make disputes more intractable—mediation worked.

For those of us who participate in, study, or encourage peacemaking efforts, the results frequently seem grim. But we should not let mediation's seemingly poor results dissuade us from promoting peacemaking. Rather, using selection effects we need to handicap the odds of mediation success and failure. Like many of the best hospitals, best conflict management practices may at first appear to be hazardous, but an understanding of the process and its challenges demonstrates their value and shows that appearances can indeed be deceptive.

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## WHO SHOULD BE AT THE TABLE?: VETO PLAYERS AND PEACE PROCESSES IN CIVIL WAR

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### INTRODUCTION

Civil war often is conceptualized as a conflict between a state and a rebel group. In reality, many civil wars, including those currently ongoing in Somalia, Darfur, Afghanistan, Iraq, Columbia, and Kashmir, contain multiple rebel groups fighting against the state at the same time. Within civil wars, there is a sub-set of these groups (which could include all of them) that have the ability to block an end to the war. These groups can be labeled “veto players” because they have the capacity to veto peace and continue the war on their own even if the other groups involved sign a peace agreement and stop fighting.<sup>1</sup>

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<sup>1</sup> See, e.g., GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002) (analyzing veto players in governmental bargaining). See generally Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in PRESIDENTS, PARLIAMENTS, AND POLICY 21-63 (Stephan Haggard & Mathew D. McCubbins eds., 2001). Scholars have examined how governmental veto players affect conflict. See Michael J. Ireland & Scott Sigmund Gartner, *Time to Fight: Government Type and Conflict Initiation in Parliamentary Systems*, 45 J. CONFLICT RESOL. 547 (2001); George Tsebelis & Seung-Whan Choi, *The Democratic Peace Revisited: It Is Veto Players*, APSA Meeting Paper (2009),



Civil wars containing more than two veto players have fundamentally different bargaining dynamics. The incentives that combatants have to enter negotiations and negotiate in good faith, as well as their ability to reach agreements that all parties find acceptable, are substantially different when there are more actors involved that can block settlement. These barriers to bargaining mean that conflicts with more veto players last substantially longer than those with fewer.<sup>2</sup>

Because these conflicts are so difficult to resolve, international efforts are much less successful in conflicts that contain more than two combatants. Several years ago, a prominent study evaluated the success of all United Nations led peacebuilding missions and found that the U.N. was “successful” in 13 out of 27 of these missions, slightly under 50%.<sup>3</sup> Dividing these cases into two-party and multi-party wars shows that peacebuilding was successful in 10 out of 16 two-party wars (63%) and only 3 out of 11 multi-party civil wars (27%).<sup>4</sup>

This article explores how peacemakers can design peace processes in multi-party civil wars with the greatest likelihood of resolution. It focuses on the question of participation in peace processes and argues that negotiations are most likely to lead to a comprehensive settlement if they include all of the veto players in the war and exclude everyone else.

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1450519](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450519). See also generally David E. Cunningham, *Veto Players and Civil War Duration*, 50 AM. J. POL. SCI. 875 (2006); DAVID E. CUNNINGHAM, *BARRIERS TO PEACE IN CIVIL WAR* (2011) (examining civil war bargaining through a veto player logic).

<sup>2</sup> See Cunningham, *Veto Players and Civil War Duration*, *supra* note 1 at 876, 881-87 (arguing that civil wars with more veto players last longer and citing empirical evidence of this relationship). See also J. Michael Greig, *Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*, 2 PENN ST. J.L. & INT’L AFF. 48 (discussing some of the difficulties for mediation presented by a large number of combatants and applying this discussion to the civil war in Syria).

<sup>3</sup> MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR & BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* 204 (2006).

<sup>4</sup> See CUNNINGHAM, *BARRIERS TO PEACE IN CIVIL WAR*, *supra* note 1 at 204.

Section I defines what it means to be a veto player in civil war. Section II examines why peace processes are prone to fail if they do not include all veto players or include actors that are not veto players. Section III explores two potential caveats to these rules, and the article concludes by illustrating the applicability of the main argument in a few cases.

### I. VETO PLAYERS IN CIVIL WAR

Veto players have the capability to unilaterally block settlement of a civil war. The concept of veto players is different from that of spoilers. Spoilers, as defined by Stephen John Stedman, are “leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it.”<sup>5</sup> Spoilers, then, are those actors who have blocked a negotiated settlement to war. Veto players are those actors who have the capability to be spoilers, whether or not they actually spoil a settlement. At a minimum, all civil wars contain two veto players—the government and one rebel group—because if either of these actors could not unilaterally continue the war it would end. Many civil wars contain more than two of these actors, and additional veto players come in a variety of types.

Many civil wars contain multiple rebel group veto players. In the 1991-2008 civil war in Burundi, an agreement signed by 19 groups in Arusha, Tanzania in 2000 failed to end the war because the two main rebel groups—the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD) and Palipehutu-National Liberation Forces (Palipehutu-FNL)—did not sign and continued fighting. In 2003, CNDD-FDD signed the Pretoria Accords and exited the conflict. The war still did not end because Palipehutu-FNL was a veto player and continued fighting. The Burundian war only ended when Palipehutu-FNL signed a peace agreement in 2008 and stopped fighting, meaning that all of the rebel group veto players had exited the conflict.

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<sup>5</sup> Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT’L SEC. 5, 5 (1997).

Civil wars can also contain multiple veto players when external states are heavily involved in the conflict. During the Apartheid era, South Africa used its military to destabilize hostile governments such as those in Angola and Mozambique by intervening in their civil wars. South Africa was a veto player in these wars because it was an actor with independent preferences and an ability to prevent full settlement of the conflicts.<sup>6</sup> In the Cold War, the United States and Soviet Union were veto players in many civil wars because they were involved and capable of prolonging the war if they did not get the outcome they wanted.

In general, civil wars contain a set of veto players including the government, one or more rebel groups and, potentially, external states. Not all of the participants to a civil war, however, are necessarily veto players, as some combatants may be so weak that they cannot block an end to the war. Identifying veto players is more challenging than identifying spoilers. Spoilers are those groups who have spoiled an agreement; veto players are those groups who could potentially spoil an agreement. In general, the factors that make parties veto players are those that make them more of a threat to the government, or more able to resist being defeated. So, combatants that have greater numbers of troops, more popular support, operate in terrain that provides protection from government attacks, have more advanced military technology and better trained and equipped troops, and have access to funding sources are more likely to be veto players.

## II. TWO RULES FOR PARTICIPATION IN PEACE PROCESSES

Negotiations in civil war can be long processes, often dragging on for months or even years. Mediators can affect the likelihood for a peaceful resolution to a war by deciding who to invite to participate in peace processes. There are two general rules.

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<sup>6</sup> See David E. Cunningham, *Blocking Resolution: How External States Can Prolong Civil Wars*, J. PEACE RES. 115, 116-17 (2010) (analyzing the effect of external state veto players on the duration of civil wars).

### Rule # 1: Include All Veto Players

The first rule is that peace processes are more likely to succeed that include the entire array of relevant veto players.<sup>7</sup> Because veto players can continue the war unilaterally, if one or more of these actors are not included in a peace process then the war will continue even if the other veto players sign an agreement and stop fighting.<sup>8</sup>

This argument may seem obvious, but there are clear cases in which mediators proceed with negotiations not involving all veto players and expect these processes to succeed. In the 1998-2000 Arusha negotiations in Burundi, CNDD-FDD and Palipehutu-FNL did not participate because the facilitator, former Tanzanian President Julius Nyerere, barred them from doing so. As those two groups were the main anti-government combatants, without their inclusion the Arusha process was doomed to fail before it began. Another example is the negotiations between Israel and the Palestinian group Fatah in the late 1990s. Those negotiations failed to lead to a comprehensive settlement of that long-running dispute for a number of reasons. One important reason was that Fatah was not the only Palestinian veto player, it did not control Hamas, and so an accord between the Israeli government and only one of the Palestinian veto players could not possibly have ended the violence.

One reason that peace processes often proceed without all veto players is that it is difficult to get them to come to the table. In ongoing civil wars, many of these actors have incentives to hold out from negotiating in hopes of obtaining a better deal later on.

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<sup>7</sup> See UNITED NATIONS, GUIDANCE FOR EFFECTIVE MEDIATION 11-12 (2012), <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf> (recognizing the importance of inclusivity in peace processes, although this source refers to “stakeholders”: a broader range of actors than veto players).

<sup>8</sup> Lakhdar Brahimi & Salman Ahmed, *In Pursuit of Sustainable Peace: The Seven Deadly Sins of Mediation*, N.Y. UNIV. CTR. ON INT’L COOPERATION 5 (2008) (stating that the failure to incorporate all veto players can be the result of ignorance—one of the “seven deadly sins of mediation” —and arguing that it is important for mediators to identify both the national actors with the power to stop or re-start the war, and the source of those actors’ external support).

Additionally, some of these groups may be opposed to negotiation as a matter of principle.

In cases where not all veto players will agree to negotiate, mediators often try one of two strategies. They may declare that negotiations will begin with the parties who are willing to participate and that everyone else will be excluded from the peace that follows. This strategy was tried in Darfur in 2007 when the main rebel groups refused to attend a peace conference in Sirte, Libya. Jan Eliasson, the mediator for the conference, stated emphatically: “The train has left on the road to peace . . . the question is how many passengers will come on.”<sup>9</sup> The problem with this strategy is that, if the main combatants are not participating, there is no credible threat to exclude them from the benefits of peace because no peace is possible. Despite Eliasson’s statement, the conference was postponed and the conflict continued.

Alternatively, mediators often try piecemeal negotiations, in which governments negotiate with rebel groups individually in sequence. This strategy was used in Chad in the 1990s where the government signed a series of bilateral agreements with rebel groups.

While sequenced bilateral negotiations may work in some cases, it is a problematic strategy. Every agreement that results in one rebel group exiting the conflict also results in a shift in the balance of power between the government and the remaining groups. One of the difficulties with finding a bargained solution to civil war is that it is difficult for actors to tell how strong they are, relative to the government. In Burundi, it was clear after the Pretoria Accord that Palipehutu-FNL was weaker relative to the combined Burundian army/CNDD-FDD forces but it took years to determine how much weaker.

Additionally, every new peace agreement reduces the government’s flexibility with the remaining groups. Peace agreements often commit specific cabinet ministries and percentages of the

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<sup>9</sup> Alfred De Montesquiou, *Darfur Talks Postponed as Rebels Boycott*, USA TODAY (Oct. 28, 2007), [http://usatoday30.usatoday.com/news/world/2007-10-28-2864852227\\_x.htm](http://usatoday30.usatoday.com/news/world/2007-10-28-2864852227_x.htm).

military and government to former rebels. As these positions are filled, it becomes harder for the government to use incentives to convince the remaining veto players that an agreement is better than fighting. Because of these problems, piecemeal negotiations should be a last resort for mediators.

#### Rule #2: Exclude Non-Veto Players

The second rule is that peace processes are more likely to succeed that exclude actors that are not veto players. Because negotiations with more parties are more prone to fail, incorporating actors that are not veto players in peace processes make it less likely that agreement will be reached by the veto players. Barring this agreement, wars continue.

A number of peace processes in recent years have included non-veto players. The 19 parties at the Arusha negotiations in the Burundian war included some armed groups but primarily unarmed political parties. Negotiations in Paris in January 2003 to resolve the Cote D'Ivoire civil war included the government, the three main insurgent groups, and delegations from six other political parties.<sup>10</sup>

Mediators may include non-veto players in peace processes because these processes often play a large role in determining the post-conflict political environment, including the design of political institutions and timetable for transition to elections. Limiting participation to armed groups has the potential to send the dangerous signal that the only way to get one's voice heard is through violence. Additionally, civil wars often occur because of deep divisions in society, and incorporating civil society and political parties may be attempts to overcome these divisions.<sup>11</sup>

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<sup>10</sup> UNITED STATES INSTITUTE OF PEACE, LINAS-MARCOUSSIS AGREEMENT (2003), [http://www.usip.org/files/file/resources/collections/peace\\_agreements/cote\\_divoire\\_01242003en.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/cote_divoire_01242003en.pdf).

<sup>11</sup> See generally Desirée Nilsson, *Anchoring the Peace: Civil Society Actors in Peace Accords and Durable Peace*, 38 INT'L INTERACTIONS 243 (2012) (arguing that incorporating civil society actors into peace agreements increases the durability of peace).

Each of these justifications has merit. However, including non-veto players in peace processes makes them more prone to fail for two reasons. First, incorporating these groups may actually create additional veto players in the negotiation. Conflicts with many veto players are longer and harder to resolve in part because it is hard to convince all of the participants that they are better off through peace than through continuing to fight. If unarmed groups are brought into a peace process and can veto any potential agreement, that increases the number of actors that can prevent a settlement that might end the war.

Second, even if non-veto players incorporated into peace processes are not allowed to veto potential agreements, their participation virtually guarantees that they will be given something in a settlement. Any concessions given to these groups, however minimal, means there are less concessions available to induce the veto players to stop fighting. In a power-sharing government, for example, the number of important ministries is finite. Ministries given to non-veto players mean less are available to convince veto players that peace is more beneficial than war.

Combining these two rules, peace processes will be most likely to succeed in ending civil wars when they include all of the veto players involved and no one else. Mediators are most likely to design successful peace processes when they analyze conflicts and determine who the veto players are and think critically about the effect of including and excluding different actors on those processes.

### III. EXCEPTIONS TO THE RULES

The above discussion presumed that each veto player was capable of continuing a war if a peace process did not include them. However, mediators could proceed with peace processes excluding veto players if international actors were willing to forcibly disarm groups that blocked the peace. This may be necessary when veto players are completely opposed to negotiation. In Rwanda, for example, the Coalition for the Defense of the Republic (CDR) was a clear spoiler that worked to prevent the implementation of the Arusha Accords. Had the international community intervened to nullify CDR, it is possible that the Arusha Accords would have

worked and the genocide would have been prevented.<sup>12</sup> In general, however, international actors are unwilling to intervene to the degree necessary to forcibly disarm veto players.

The above discussion also assumed that the goal of peace processes is to end wars. If that is the goal, then these processes are most likely to succeed if they include all, and only, the veto players. However, in many cases mediators and others may have interests beyond just ending the fighting, such as promoting democratization or social justice. To pursue those goals, it is possible that some veto players should be excluded or some non-veto players included.<sup>13</sup>

Mediators should be cautious about this, however. In many cases, goals such as democratization or social justice can only be pursued once civil war ends. Prioritizing other important goals can be dangerous if it leads to the design of peace processes that are less likely to actually end the war.

#### IV. CONCLUSION—THE RULES IN ACTION

The peace process around the 1999 Lusaka Accords in the Democratic Republic of the Congo (DRC) is one in which mediators included all veto players and excluded non-veto players from direct negotiation.<sup>14</sup> Early rounds of negotiations in the conflict had been derailed because they only included the DRC government and external state participants (such as Rwanda and Uganda). However, Congolese rebel groups were clearly veto players, and the Lusaka Peace Process incorporated them. At the same time, the Lusaka process left out non-veto players such as political parties and civil society organizations. These groups were not completely excluded

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<sup>12</sup> See CUNNINGHAM, BARRIERS TO PEACE IN CIVIL WAR, *supra* note 1 at 184, 211, 214. For a more extensive discussion of the Rwandan peace process, see *id.* at ch. 4.

<sup>13</sup> Beardsley discusses how the best strategies for mediators may differ depending on whether they aspire to a cessation of hostilities or to build long-term peace. See generally Kyle Beardsley, *Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution*, 2 PENN. ST. J.L. & INT'L AFF. 57 (2013).

<sup>14</sup> See CUNNINGHAM, BARRIERS TO PEACE IN CIVIL WAR, *supra* note 1 at ch. 6 (describing the peace process in the Democratic Republic of the Congo).



from political discussion, rather, they were incorporated into an “Inter-Congolese Dialogue” which was designed to decide the political future of the country.

The DRC civil war ended in 2002, largely along the lines laid out by the Lusaka Accords. For the last ten years the DRC has certainly not been a peaceful, stable, or democratic place. However, the level of violence in Congo is much lower than it was during the civil war, at least in part as a result of the Lusaka process.

Despite this example, mediators often make decisions about participation in peace processes that hamper, rather than augment, the chances of peace. In Burundi and Darfur, negotiations excluded veto players and included non-veto players and failed to produce peace. Peace is possible in multi-party conflicts, but only if peacemakers understand their unique dynamics and design and implement processes responsive to these dynamics.

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## INTRACTABLE SYRIA? INSIGHTS FROM THE SCHOLARLY LITERATURE ON THE FAILURE OF MEDIATION

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### INTRODUCTION

Since its beginning in March 2011, the conflict in Syria has produced considerable human suffering and increased the risk of greater regional instability. The conflict has produced in excess of 35,000 fatalities and displaced hundreds of thousands of Syrians.<sup>1</sup> Violence against civilians has brought widespread condemnation from across the international community. This violence, in turn, has also increased calls for action to stop the fighting in Syria and protect its civilian population.

To this end, a wide array of sanctions has been imposed upon the Syrian government by actors including the United States, members of the European Union, the Arab League, and regional powers such as Turkey. The United Nations Security Council has been sharply divided on how to deal with the crisis, with the United States, Great Britain, and France calling for tougher language and action against the Assad regime, and Russia and China in opposition. Despite this lack of unanimity on the Security Council, U.N.

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<sup>1</sup> See CNN Staff, *By the Numbers: Syria Deaths*, CNN.COM, Jan. 9, 2013, <http://www.cnn.com/2013/01/08/world/meast/syria-civil-war-compare/index.html>; VDC: CENTER FOR DOCUMENTATION OF VIOLATIONS IN SYRIA, <http://www.vdc-sy.org/index.php/en/> (last visited Apr. 10, 2013).

Secretary General Ban Ki Moon appointed former U.N. Secretary General Kofi Annan as U.N.-Arab League Joint Special Envoy on Syria in February 2012. Efforts to mediate the Syrian conflict are consistent with the broader tendency of mediation to be applied to the most difficult conflicts in the international system.<sup>2</sup> Despite Annan's presentation of a plan to end the conflict and the dispatch in April 2012 of a U.N. ceasefire monitoring mission, the Syrian conflict has proven difficult to manage. A lasting ceasefire has proven elusive among the belligerents, with conflict escalating sufficiently that activities by the U.N. monitoring mission were suspended in June 2012 and its mandate went without renewal following its expiration. Deteriorating conditions in August 2012 and the refusal of the Syrian regime to negotiate led to the resignation of Kofi Annan, who was subsequently replaced as U.N. envoy to Syria by Lakhdar Brahimi. In his resignation, Annan laid blame for the failure of mediation at the feet of both external powers as well as the warring sides themselves stating, "without serious, purposeful and united international pressure, including from the powers of the region, it is impossible for me, or anyone, to compel the Syrian government in the first place, and also the opposition, to take the steps necessary to begin a political process."<sup>3</sup>

The inability of the United Nations or any other third party to broker an end to the violence in Syria, despite early and frequent demands by an array of outside powers for a cease-fire and the dispatch of peace envoys and a U.N. monitoring force, raises the question of why the Syrian conflict has proven so impervious to settlement. Not only have third-party efforts to manage the conflict been unsuccessful, but conditions have continued to deteriorate in Syria with the level of violence mounting on both sides and civilian suffering deepening. In this paper, I explore the ways in which some of the insights from the scholarly conflict management literature can be brought to bear in understanding the specific challenges faced by

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<sup>2</sup> See Scott Sigmund Gartner, *Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds*, 2 PENN ST. J.L. & INT'L AFF. 27 (2013).

<sup>3</sup> Rick Gladstone, *Annan Steps Down as Peace Envoy and Cites Barriers in Syria and the United Nations*, N.Y. TIMES, Aug. 3, 2012 at A6, <http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html?pagewanted=all>.

third-party efforts to manage the Syrian conflict. I argue that the characteristics of the warring sides and the way in which fighting has evolved between the Syrian government and rebels each play an important role in the failure of conflict management.

#### NUMBER OF PARTIES

The number of parties involved in a conflict plays an important role in the prospects for successful mediation. In general, as the number of parties in a conflict grows, the chances for mediation success dim. Increasing the number of parties involved in conflict brings three problems for mediation. First, communications become tougher as the number of parties involved in a conflict increase.<sup>4</sup> A mediator confronting a conflict involving several parties faces the difficult task of coordinating communications among each side while limiting the chances of miscommunications. Second, increasing the number of parties involved in a conflict raises the risk of spoilers for the peace process. Increasing the number of warring actors also increases the number of interests at stake among the parties, increasing the number of veto players<sup>5</sup> and raising the risk that one or more parties oppose a settlement agreed to by the others. This can create spoilers who engage in violence to derail the peace process until their own demands are met.<sup>6</sup> Third, increasing the number of players in a conflict also increases the possibility of commitment problems for any settlement. Peace efforts in civil wars are inherently susceptible to commitment problems in which, even if an agreement can be reached, the lack of enforcement makes neither side confident that the other will live up to the terms of the agreement.<sup>7</sup> Commitment problems are exacerbated as the number of actors involved in a conflict grows because agreement monitoring becomes more difficult and the chances of spoilers increases.

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<sup>4</sup> See J. MICHAEL GREIG & PAUL F. DIEHL, INTERNATIONAL MEDIATION 104-105 (2012).

<sup>5</sup> See David Cunningham, [\*Who Should Be at the Table? Veto Players and Peace Processes in Civil War\*](#), 2 PENN ST. J.L. & INT'L AFF. 38 (2013).

<sup>6</sup> See Desirée Nilsson, *Partial Peace: Rebel Groups Inside and Outside of Civil War Settlements*, 45 J. PEACE RES. 479, 481-82 (2008).

<sup>7</sup> See Barbara F. Walter, *Bargaining Failures and Civil War*, 12 AM. REV. POL. SCI. 243, 254 (2009).

In this respect, the Syrian conflict presents a difficult challenge for third parties seeking to mediate it. Because the rebels are divided among a large number of groups, each with different goals and backgrounds, it is difficult to simply identify all of the actors needed to participate in any potential peace process. Although the Free Syrian Army provides a unified name to much of the armed Syrian opposition, this unity is limited. The Free Syrian Army is, at best, a very loose collection of militia groups with minimal coordination among one another.<sup>8</sup> Foreign supporters of the Syrian opposition have sought to encourage the development of a broad coalition group to bring the rebels under one political umbrella. The Syrian National Council was an early effort at unity, but it proved difficult to coordinate with the Free Syrian Army, and struggled with major divisions among constituent groups. The new National Coalition of Syrian Revolutionary and Opposition Forces is another effort to unify the Syrian rebels, but its prospects for success remain uncertain.<sup>9</sup>

#### INTENSITY AND DURATION OF VIOLENCE

Just as the characteristics of the warring sides shape the chances for effective mediation, a large body of scholarly literature points to the way in which a conflict unfolds over time as a key influence on the chances that diplomatic efforts will be fruitful.<sup>10</sup> While some civil conflicts at their outset may inherently be more or less susceptible to successful conflict management efforts, what takes place on the battlefield over the course of the conflict shapes the incentives for warring sides to accept mediation and make the

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<sup>8</sup> See Rania Abouzeid, *Syria's Secular and Islamist Rebels: Who are the Saudis and the Qataris Arming?*, TIME, Sep. 18, 2012, <http://world.time.com/2012/09/18/syrias-secular-and-islamist-rebels-who-are-the-saudis-and-the-qataris-arming/>.

<sup>9</sup> See Jonathan Masters, *Syria's Crisis and the Global Response*, COUNCIL ON FOREIGN RELATIONS, Feb. 5, 2013, <http://www.cfr.org/syria/syrias-crisis-global-response/p28402>.

<sup>10</sup> See, e.g., Dean Pruitt, *Ripeness Theory and the Oslo Talks*, 2 INT'L NEGOTIATIONS 237 (1997); J. Michael Greig, *Moments of Opportunity: Recognizing Conditions of Ripeness for International Mediation Between Enduring Rivals*, 45 J. CONFLICT RESOL. 691 (2001); I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* (1989).

concessions for a settlement. As a result, some points in time during a conflict present better opportunities for effective third-party diplomacy than others.

One of the challenges in managing a civil conflict is that as the level of violence among belligerents grows, it increases hostility among the parties, encouraging even more violence in the future.<sup>11</sup> This process, in turn, closes off communication between warring sides,<sup>12</sup> increases the extent to which the parties see themselves as victims of the other,<sup>13</sup> and encourages the belligerents to frame their goals in terms of punishing the other side.<sup>14</sup> Put together, increasing levels of violence undermine the likelihood and effectiveness of mediation efforts in managing the conflict.

The intensity of violence in Syria directly cuts against third-party efforts to manage the conflict and locate a settlement. When mediation is applied to a civil war immediately following a spike in battle deaths, the chances that talks will produce an agreement among the combatants is sharply reduced.<sup>15</sup> This is precisely the pattern that casualty levels in Syria have followed. From June 2012 to August 2012, the number of Syrian casualties increased sharply, growing from 2204 deaths in June to 5037 killed in August.<sup>16</sup> Rising casualty levels in Syria have made it harder for third-party efforts to manage the conflict.

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<sup>11</sup> See ZARTMAN, *supra* note 10, at 263.

<sup>12</sup> See Jacob Bercovitch, J. Theodore Anagnoson & Donette L. Wille, *Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations*, 28 J. PEACE RES. 7, 13 (1991); THOMAS PRINCEN, *INTERMEDIARIES IN INTERNATIONAL CONFLICT* 54-59 (1992).

<sup>13</sup> See generally STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* (Cambridge University Press 2006) (1964).

<sup>14</sup> See Dean Pruitt & Paul Olczak, *Beyond Hope: Approaches to Resolving Seemingly Intractable Conflict*, in *CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH* 59 (Barbara Bunker & Jeffrey Rubin eds., 1995).

<sup>15</sup> J. Michael Greig, *Rebels at the Gates: Civil War Battle Locations, Movement, and Openings for Mediation*, paper presented at the 2012 Meeting of the Folke Bernadotte Academy Conflict Prevention Working Group, State College, PA, 2012.

<sup>16</sup> David Kenner, *Syria Is More Violent Than Iraq at Its Worst*, FOREIGN POL'Y (Sept. 11, 2012, 10:27AM), [http://blog.foreignpolicy.com/posts/2012/09/10/syria\\_is\\_more\\_violent\\_than\\_iraq\\_at\\_its\\_worst](http://blog.foreignpolicy.com/posts/2012/09/10/syria_is_more_violent_than_iraq_at_its_worst).

Although rising casualty levels diminish the chances for mediated agreement, the conflict management literature points to another window for effective third-party diplomacy that is relevant to Syria. While warring sides build up animosity and become less willing to compromise the more they fight, at some point, as the two sides build up more conflict costs, belligerents begin to seek an alternative to fighting.<sup>17</sup> As these costs grow for the belligerents, with neither able to overcome the other and suffering increasing for each, a hurting stalemate emerges.<sup>18</sup> The development of this hurting stalemate during a conflict creates a second window of opportunity for mediation to end the fighting. Fundamental to the hurting stalemate is that both sides must feel unacceptably painful conflict costs and each must *perceive* that it cannot win the conflict and impose its own terms of settlement. When a hurting stalemate develops, civil war combatants become more open to mediation and grow more willing to make the concessions necessary for a settlement.

What does this mean for Syria? Despite the deepening suffering among the Syrian populace and the worsening level of violence, there is little indication that Syria has developed sufficiently into a hurting stalemate that settlement is likely. Although the level of conflict is high, there is no evidence that it is unbearably so for either side. At the same time, there is also nothing to suggest that either side believes that it cannot ultimately prevail in the conflict and impose its own terms without negotiation. Civil war research suggests that the chances for mediation success only begin to approach the odds of success that exist early in a civil conflict after fighting has continued for 130 months and 33,000 battle-deaths have resulted, a level well above where the Syrian conflict is.<sup>19</sup> In this respect, Syria finds itself in a nether zone of conflict. The warring sides have fought long enough to become so hostile that there is little, if any, trust between them and dialogue among the belligerents has become virtually

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<sup>17</sup> See J. Michael Greig & Patrick Regan, *When Do They Say Yes? An Analysis of the Willingness to Offer & Accept Mediation in Civil Wars*, 52 INT'L STUD. Q. 759 (2008).

<sup>18</sup> See I. William Zartman, *Ripeness: The Hurting Stalemate and Beyond*, in INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 225 (Paul C. Stern & Daniel Druckman eds., 2000).

<sup>19</sup> Greig, *supra* note 15.

impossible. At the same time, the history of conflict has yet to reach a sufficiently painful, stalemated point that the parties become open to a settlement. From the perspective of a mediator, Syria finds itself in the worst of all possible worlds.

#### GEOGRAPHY OF THE BATTLEFIELD

Beyond the intensity and duration of violence, where fighting between rebel and government forces occurs also significantly impacts the success of mediation. This has direct implications for the conflict in Syria. One of the challenges that a rebel force challenging a government faces is demonstrating its ability to mount a credible, durable threat to the regime. If a government anticipates that the rebels can be quickly defeated or doubts the ability of the rebels to impose significant costs on the regime, there is little reason for the regime to negotiate with the rebels. To push governments to the bargaining table, rebels must demonstrate their ability to impose unacceptable costs on the regime. One way for rebels to do this is to mount a military threat to a country's major cities. In doing so, rebels can disrupt important economic, social, and political activity for the country. This can increase pressure from the populace on the government to negotiate with the rebels.

As Syrian rebels increased their ability to threaten the government across broader swaths of territory, their ability to impose costs on the government also increased. As protests spread from Dara'a to Homs and Aleppo, important industrial and financial centers, the Syrian government began to signal their willingness to make some limited concessions. At this point, however, these concessions were not sufficient to stop the violence from deepening and appeared more tactical than sincere. This points to a particular challenge faced in managing civil conflicts. Conditions that might encourage one side to offer concessions can encourage the other to resist settlement with the expectation of better terms from fighting than talking. As rebels see more success on the battlefield, they tend to increase their demands on the government during talks. When these increased demands are unacceptable for the regime, diplomatic efforts become more likely to fail.



The best example of this tendency for rising expectations of victory to influence mediation is the effect that civil war battles fought near the capital exert. Rather than increasing the likelihood of agreement, the closer civil war battles occur to the capital, the less likely mediation is to take place at all and, when it does occur, the less likely it is to be successful.<sup>20</sup> These diminished prospects for mediation are a function of the distinct effects that such battles have on both rebels and governments. For rebels, as their ability to sustain a challenge near the capital grows, they increasingly see better prospects for victories. As a result, rebels tend to increase their demands on the regime in any settlement talks.<sup>21</sup> A government facing rebels near the capital is likely to see continued fighting as preferable to agreement. First, such a government may see the potential demands from the rebels as likely to be unacceptable to the regime, potentially demanding terms such as the complete removal of government officials. Second, even a government interested in reaching a settlement may conclude that it can get better terms if it is able to push the rebels away from the capital.

The way the dynamics of the Syrian conflict changed in July 2012 as rebel attacks began on the capital is consistent with this line of thinking. The mounting violence in the capital not only imposed real costs on the Syrian regime, but also carried important psychological costs as well. Neil MacFarquhar argues that keeping violence away from Damascus had an important effect on the Syrian psyche, suggesting that protecting Damascus from threat “became a kind of a psychological yardstick: if Damascus remained under control, it meant the Assad government was still in control.”<sup>22</sup> As these attacks on the capital mounted, rather than offering concessions or embracing diplomacy, the Assad regime adopted increasingly aggressive measures, using air strikes against rebel positions in Aleppo and Damascus and shelling Damascus neighborhoods where rebel forces were believed to be located. In this

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<sup>20</sup> See *id.*

<sup>21</sup> See Halvard Buhaug & Jan Ketil Rød, *Local Determinants of African Civil Wars, 1970–2001*, 25 POL. GEOGRAPHY 315 (2006).

<sup>22</sup> Neil MacFarquhar, *Damascus Confronts New Reality After Attack*, N.Y. TIMES, July 18, 2012, at A13, [http://www.nytimes.com/2012/07/19/world/middleeast/bombing-attack-shifts-equation-in-syria-uprising.html?\\_r=0](http://www.nytimes.com/2012/07/19/world/middleeast/bombing-attack-shifts-equation-in-syria-uprising.html?_r=0).

respect, Jeffrey White, former senior Middle East analyst for the Defense Intelligence Agency, argues that “There will not be any negotiations . . . . He [Assad] will go down fighting, and he will probably do it in Damascus.”<sup>23</sup>

#### CONCLUSION

The Syrian conflict has seen a variety of third-party efforts from individual states, the Arab League, and the United Nations to manage the conflict and find a settlement. Thus far, the conflict has proven intractable. Former U.N. Secretary General Kofi Annan’s lament about the lack of purposive and unified action by the international community toward Syria explains some of this conflict management failure. Others have laid some of the blame at the feet of the decisions made by those who have attempted to mediate the conflict. Yet, what we know about conflict management points to characteristics of the Syrian conflict that make it inherently difficult to resolve diplomatically. The characteristics of the parties and how they have fought each shape the effectiveness of conflict management even before the mediators arrive.

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<sup>23</sup> Joby Warrick & Anne Gearan, *For Syria’s Assad Only Exit May Be a Body Bag*, WASH. POST, Aug. 1, 2012, at A01, [http://articles.washingtonpost.com/2012-07-31/world/35486777\\_1\\_syrian-president-bashar-al-assad-aleppo-troops-battle-rebels](http://articles.washingtonpost.com/2012-07-31/world/35486777_1_syrian-president-bashar-al-assad-aleppo-troops-battle-rebels).

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## USING THE RIGHT TOOL FOR THE JOB: MEDIATOR LEVERAGE AND CONFLICT RESOLUTION

*Kyle Beardsley\**

### INTRODUCTION

There is tremendous variation in how third parties conduct international mediation.<sup>1</sup> Mediation might involve such functions as the mere hosting of talks, substantive participation in the negotiation process, shuttle diplomacy, or heavy-handed involvement in which the third party shapes the incentives of the parties to reach an agreement.<sup>2</sup> With such possible variation, mediators must especially tailor the level of leverage—the extent to which the third party uses

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<sup>1</sup> Mediation entails permissive third-party engagement with multiple disputants in a peace process.

<sup>2</sup> The mediation literature has focused on three main styles of mediation that need not be mutually exclusive: facilitation, formulation and manipulation. *See generally* Kyle C. Beardsley, David M. Quinn, Bidisha Biswas & Jonathan Wilkenfeld, *Mediation Style and Crisis Outcomes*, 50 J. CONFLICT RESOL. 58 (2006); Jacob Bercovitch, *Mediation in International Conflict: An Overview of Theory, a Review of Practice*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS & TECHNIQUES 125-53 (I. William Zartman & J. Lewis Rasmussen eds., 1997); I. William Zartman & Saadia Touval, *International Mediation*, in LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 437-54 (Chester A. Crocker et al. eds., 2007); Jonathan Wilkenfeld, Kathleen J. Young, David M. Quinn & Victor Asal, *MEDIATING INTERNATIONAL CRISES* (2005); David Quinn, Jonathan Wilkenfeld, Pelin Eralp, Victor Asal & Theodore McLauchlin, *Crisis Managers but Not Conflict Resolvers: Mediating Ethnic Intrastate Conflicts in Africa*, CONFLICT MGMT. & PEACE SCI. (forthcoming 2013).

positive and negative inducements, either explicit or implicit, to move negotiations forward—to the needs of the situation.<sup>3</sup> In international dispute mediation, a one-size-fits-all view of mediation may actually inhibit effective conflict resolution.

This essay highlights the importance of third parties choosing their mediation styles with eyes wide open to the context of the conflict. In what follows, this essay first considers existing studies that have found both potential benefits and risks of heavy-handed third-party involvement—which rely on implicit or explicit threats of punishment or promises of assistance—as a conflict-management strategy.<sup>4</sup> It then considers a few illustrative cases to demonstrate the importance of making sure that the tools of mediation fit the context. Finally, it concludes with a discussion of how sustained post-conflict peacekeeping and peacebuilding can reduce some of the risks of leverage in mediation.

#### I. THE STRENGTHS AND RISKS OF LEVERAGE IN EXISTING STUDIES

Starting with the upside of leverage, existing work has found that it is often critical that international dispute mediators employ positive and negative inducements in a way that creates sufficient

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<sup>3</sup> The use of leverage matches to the “manipulative” style used in the literature referenced above. See, e.g., Peter J. D. Carnevale, *Strategic Choice in Mediation*, 2 NEGOT. J. 41, 44-45 (1986) (characterizing the use of leverage in mediation as involving “compensation” and “pressing” tactics). In addition to “manipulation,” the use of leverage is also sometimes referred to as a “directive” style of mediation. See, e.g., KENNETH KRESSEL, LABOR MEDIATION: AN EXPLORATORY SURVEY 13 (1972); Peter J. D. Carnevale & Richard Pegnetter, *The Selection of Mediation Tactics in Public-Sector Disputes*, 41 J. SOC. ISSUES 65, 67 (1985). Moreover, the use of leverage can also be termed “power” mediation. See, e.g., Loreleigh Keashly & Ronald J. Fisher, *A Contingency Perspective on Conflict Interventions: Theoretical and Practical Considerations*, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 235 (Jacob Bercovitch ed., 1996); Isak Svensson, *Mediation with Muscles or Minds? Exploring Power Mediators and Pure Mediators in Civil Wars*, 12 INT’L NEGOT. 229, 230 (2007). But see Robert Rauchhaus, *Asymmetric Information, Mediation and Conflict Management*, 58 WORLD POL. 207, 224-25, 233 (2006) (terming it “heavy” mediation).

<sup>4</sup> Mediation with leverage can involve both immediate inducements for agreement or pledges of future inducements to help guarantee the peace.

leverage to incentivize the disputing parties to reach an agreement.<sup>5</sup> Intractable conflicts often need external prodding to create a sense of a mutually hurting stalemate when the status quo level of hostilities seems more acceptable to the parties than taking political or security risks in making substantial concessions.<sup>6</sup> The set of tools available to intermediaries that do not use leverage is indeed quite limited. Third parties that merely serve a role of providing the disputants with greater clarity of the relevant parameters often struggle to learn information that the disputants themselves do not already know or to convey credibly such information, or both.<sup>7</sup> Moreover, third parties that are unable to use leverage to guarantee settlements reached during negotiations will be unable to resolve concerns of mistrust between vulnerable actors who might be reluctant to reach a deal that obliges them to draw down their security forces.<sup>8</sup> Leverage might also be needed to shield the disputants from political backlash for unpopular concessions.<sup>9</sup>

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<sup>5</sup> This relates to work pioneered by Jacob Bercovitch on contingency theory. See generally, e.g., Jacob Bercovitch & Scott Sigmund Gartner, *Is There Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 32 INT'L INTERACTIONS 329 (2006); Jacob Bercovitch & Richard Jackson, *Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict*, 17 NEGOT. J. 59 (2001); Jacob Bercovitch & Jeffrey Langley, *The Nature of the Dispute and the Effectiveness of International Mediation*, 37 J. CONFLICT RESOL. 670 (1993).

<sup>6</sup> I. William Zartman & Saadia Touval, *International Mediation: Conflict Resolution and Power Politics*, 41 J. SOC. ISSUES 27, 41 (1985); Zartman & Touval, *International Mediation*, *supra* note 2; Saadia Touval, *Why the U.N. Fails*, 73 FOREIGN AFF. 44, 51 (1994); Moorad Mooradian & Daniel Druckman, *Hurting Stalemate or Mediation? The Conflict over Nagorno-Karabakh, 1990-95*, 36 J. PEACE RES. 709, 712 (1999); Svensson, *Mediation with Muscles or Minds?*, *supra* note 3 at 237. See also Molly M. Melin, [When States Mediate](#), 2 PENN. ST. J.L. & INT'L AFF. 78 (2013) (offering an account of how actors with leverage are deemed more acceptable by disputants).

<sup>7</sup> See Mark Fey & Kristopher W. Ramsay, *When is Shuttle Diplomacy Worth the Commute? Information Sharing Through Mediation*, 62 WORLD POL. 529, 531 (2010); Alastair Smith & Allan Stam, *Mediation and Peacekeeping in a Random Walk Model of Civil and Interstate War*, 5 INT'L STUD. REV. 115, 117 (2003).

<sup>8</sup> See generally BARBARA F. WALTER, *COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS* (2002).

<sup>9</sup> See Kyle Beardsley & Nigel Lo, *Third-Party Conflict Management and the Willingness to Make Concessions*, J. CONFLICT RESOL. (forthcoming 2013).

On the other hand, even though many negotiations critically depend on third-party pressure, there are also real risks for using too much third-party leverage when less would suffice. Not only is leverage more costly to the third party, which often must follow through on threats and promises, but it can prove detrimental to peace stability in the long term. When third parties are heavy handed in their approach, they create artificial incentives for agreements that are not likely sustainable over time.<sup>10</sup> As a third-party's interests shift and influence wanes, former combatants that had reached an agreement primarily because of the third-party's enticements will be more prone to abandon their agreements than former combatants that reached an agreement with less incentivizing. The problem of attenuated third-party involvement is especially strong when multiple third parties are involved heavy-handedly in the peace process because of the more difficult coordination needs in the post-conflict setting.<sup>11</sup> Separately, mediation with leverage can also restrict the ability for disputants to walk away from negotiations that their opponent is pursuing as a simple stalling tactic or that are otherwise destined to fail.<sup>12</sup>

The existing work on mediation regarding these tradeoffs suggests a basic rule of thumb that mediation with leverage should be reserved only to stop ongoing or imminent massive bloodshed, especially when the violence endangers non-combatants. That is, the

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<sup>10</sup> See KYLE BEARDSLEY, *THE MEDIATION DILEMMA* (2011); Kyle Beardsley, *Agreement Without Peace? International Mediation and Time Inconsistency Problems*, 52 AM. J. POL. SCI. 723, 737 (2008); Suzanne Werner & Amy Yuen, *Making and Keeping Peace*, 59 INT'L ORG. 261, 269 (2005); Mehmet Gurses, Patrick McLeod & Nicolas Rost, *Mediating Civil War Settlements and the Duration of Peace*, 34 INT'L INTERACTIONS 129, 136 (2008); Zartman & Touval, *International Mediation*, *supra* note 2 at 452 (highlights the dilemma that mediators face in choosing to push for an early ceasefire or wait for a durable settlement to emerge).

<sup>11</sup> See BEARDSLEY, *THE MEDIATION DILEMMA*, *supra* note 10; Tobias Böhmelt, *Disaggregating Mediations: The Impact of Multiparty Mediation*, 41 BRIT. J. POL. SCI. 859, 860 (2011); Chester A. Crocker, Pamela Aall & Fen Osler Hampson, *Is More Better?: The Pros and Cons of Multiparty Mediation*, in *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 497-513 (Chester A. Crocker et al. eds., 2001); Birger Heldt, [\*The Lack of Coordination in Diplomatic Peacemaking\*](#), 2 PENN. ST. J.L. & INT'L AFF. 9 (2013).

<sup>12</sup> See generally Kyle Beardsley, *Intervention without Leverage: Explaining the Prevalence of Weak Mediators*, 35 INT'L INTERACTIONS 272 (2009).

use of strong mediation should be motivated primarily out of short-term humanitarian goals in order to justify the long-term risks of making post-conflict peace more fragile and the lack of patience in waiting for a more organic peace to emerge. At the same time, more minimal third-party involvement should be used when a long-term, self-enforcing peace is the most pressing concern and humanitarian responsibilities are not as pressing. Indeed, it is difficult, and in many cases impossible, for third parties to successfully attain both an immediate reduction in hostilities and a long-term resolution of the relevant points of contention.

## II. MATCHING THE TOOL TO THE PROBLEM IN PRACTICE

It is helpful to consider historical cases in which hindsight suggests that third parties used too little or too much leverage, as well as cases in which the level of leverage more appropriately matched the needs of the situation. The problem of not using sufficient leverage when it is needed to stop mass atrocities can be seen recently in Syria.<sup>13</sup> Kofi Annan's initiative to facilitate a ceasefire between Assad and the rebels never had teeth as long as Russia and China blocked passage of U.N. Security Council resolutions that would authorize punishment for continued intransigence and as long as a coalition of the willing to threaten Assad failed to materialize. During the ceasefire, Assad was more or less free to continue direct attacks against rebel positions and indirect attacks against sympathizers via support for pro-government militias.

On the flip side, the risk of using too much short-term leverage was demonstrated perhaps most dramatically in the lead up to the 1994 Rwanda genocide.<sup>14</sup> The 1993 Arusha Accords resulted from substantial third-party pressure and the promise of a peacekeeping force to guarantee the peace. However, once the mediator involvement waned upon the signing of the Accords and

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<sup>13</sup> J. Michael Greig, in this issue, provides a detailed account of why this conflict has proven so difficult to manage. J. Michael Greig, [\*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation\*](#), 2 PENN. ST. J.L. & INT'L AFF. 48 (2013).

<sup>14</sup> See Alan J. Kuperman, *The Other Lesson of Rwanda: Mediators Sometimes Do More Damage than Good*, 16 SAIS REV. 221, 222 (1996).

the peacekeeping force turned out to be weaker than expected and slow to deploy, implementation of the Accords failed and a window of opportunity for Hutu extremist militias to establish their dominance emerged. Stated more particularly, the leverage of the mediating parties, coupled with their inability to follow through on their commitments, left much of the Tutsi and moderate Hutu populations vulnerable to annihilation perpetrated by Hutu militia groups intentionally left out of the peace process. It is also important to note that the violence during the Rwandan civil war that preceded the Accords was not nearly as threatening to non-combatant populations as the genocide that followed. That is, the heavy-handed third-party involvement, in retrospect, was not well justified on humanitarian grounds.

More positively, Richard Holbrooke's role in pushing for the Dayton Accords amidst NATO bombings of Serbian positions at the end of the Bosnian War presents a compelling example of a case in which the use of much needed leverage effectively calmed a humanitarian disaster. Prior to the extreme heavy-handed intervention, earlier mediation attempts lacking sufficient leverage failed to halt the violence. These earlier efforts stand in stark contrast to Holbrooke's role, such that it is often lamented that the international community did not act stronger sooner. Note that this does not mean that Holbrooke's role is an appropriate model of how third parties can foster long-term, self-enforcing peace, as Bosnia continues to sit on a razor's edge with a real risk of returning to interethnic conflict. But it does well demonstrate that strong third-party involvement is often necessary to stop the killing and force a hurting stalemate, and that the risks of long-term instability may very well be worth the intervention.

Another example of a well-matched mediation effort, Marti Ahtisaari's role in the Aceh peace process, which led to the transformation of the Free Aceh Movement (GAM) from a rebel group to a legitimate political actor, demonstrates the promise of more hands-off involvement being better able to facilitate long-term peace. As the former president of Finland and founder of the Crisis Management Initiative, Ahtisaari lacked any ability to manipulate the incentives of the disputants, but he was able to shape the momentum for peace—generated by the 2004 Indian Ocean Tsunami and



military gains by Indonesian forces—and help formulate an agreement that involved concessions on both sides with an eye toward long-term political transformation. This example, however, illustrates that while agreements that result from softer forms of mediation are more likely to become self-sustaining, the problem is in getting to the agreement in the first place. Without leverage, the parties already have to be motivated to resolve their dispute peacefully, but that is often asking quite a lot. Weak mediation may not carry much risk, but it also might not carry much value added when a protracted conflict environment needs more third-party engagement. That is, weak mediation can perform quite well when the conflict is already “ripe” for resolution, but it can struggle to help “ripen” the conflict in the first place.<sup>15</sup>

### III. COMBINING MEDIATION WITH PEACEKEEPING AND PEACEBUILDING

In light of the limitations and risks surrounding the use of leverage, single third-party efforts generally fail to produce both immediate humanitarian relief to the bloodiest conflicts and long-term conflict resolution. As such, it is helpful to think more broadly about peace processes as potentially involving multiple third-party efforts that unfold over time. Post-conflict peacekeeping and peacebuilding, when effective, can supplement mediator efforts to achieve both short-term and long-term effects.<sup>16</sup> If there is sufficient international will to sustain leverage and engagement after hostilities have attenuated, then mediation is not likely to create a large risk for a fragile peace after short-term success in attenuating the hostilities.

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<sup>15</sup> See I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* 266 (1985); J. Michael Greig, *Moments of Opportunity: Recognizing Conditions of Ripeness for International Mediation between Enduring Rivals*, 45 J. CONFLICT RESOL. 691, 692 (2001) (overviews what ripeness entails).

<sup>16</sup> Peacekeeping and peacebuilding both entail permissive third-party involvement for the purposes of enhancing the stability and duration of peace in a post-conflict environment. Peacekeeping implies a military component, and peacebuilding implies a political, social or economic component. These terms often overlap but need not be provided by the same third parties performing mediation.

Turning first to peacekeeping, deploying international forces can maintain the outside pressure that existed at the time of agreement and keep the parties motivated to uphold their commitments. That being said, peacekeeping is expensive—even when the costs can be distributed across U.N. or regional organization memberships—and the financial and decision-making burdens often fall to those third parties in the developed world that are fairly insulated from the externalities of recurrent conflict. So, peacekeeping cannot be counted on as a solution to the mediation attenuation problem because third parties that would be willing to step in as peacekeepers and indefinitely remain engaged as guarantors of the peace are often hard to find.<sup>17</sup>

Peacebuilding missions that follow intrastate conflict provide an interesting middle ground, and their increasing prominence is perhaps well justified given how they can help resolve the long-term issues caused by heavy-handed, third-party involvement. Peacebuilding encompasses a number of reforms that can include various dimensions of political, economic and security sector reform.<sup>18</sup> Relevant to the long-term risks related to heavy-handed mediation, one of the central goals of peacebuilding is to ensure that the key stakeholders are invested in maintaining peace and not dependent on third-party inducements. Through the promotion of democracy and power sharing, peacebuilding strives to enable the voices of each of the key constituent groups to be heard; through the promotion of economic development, peacebuilding strives to diversify the set of groups that would benefit from sustained peace; and through security sector reform, peacebuilding strives to improve the capacity of the state to maintain order and reduce the ability for one side to threaten others through use of the state security apparatus. While peacebuilding that follows strong mediation can

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<sup>17</sup> See generally VIRGINIA PAGE FORTNA, *DOES PEACEKEEPING WORK?: SHAPING BELLIGERENTS' CHOICE AFTER CIVIL WAR* (2008); MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* (2006). This is not to say that peacekeeping is ineffective when it occurs, which would be inconsistent with some of the existing literature. The point is that peacekeeping cannot be taken as a given supplement to mediator leverage, as it still depends crucially on third-party long-term investment.

<sup>18</sup> See ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* 38-39 (2004).

help bridge the gap between the incentives at the time of agreement and the incentives in the future in the absence of sustained third-party engagement, an important caveat is that peacebuilding in many post-conflict states might be more accurately described as nation building and still needs substantial, sustained international involvement for self-sustaining peace to adhere. Moreover, a close equivalent of peacebuilding does not in practice exist for interstate conflicts.

## CONCLUSION

This article has considered the risks inherent in deciding how much leverage a third party should bring to bear in a conflict management effort. Too much leverage, especially when the leverage is difficult to sustain indefinitely, can risk promoting artificial incentives that lead to fragile terms of peace. Too little leverage in the face of ongoing and imminent bloodshed carries obvious humanitarian risks. The lesson to take away from this analysis is not that mediators can do no good. Indeed, mediators can do much good when they are able to use leverage to stop ongoing brutal violence in the short-term, especially when they can sustain that leverage over time. Moreover, mediators can do much good when they use lighter tactics to help disputants get over some of the final barriers to durable settlements that are not negotiated under duress. In these ways, practitioners of mediation can choose the form of their involvement with accurate expectations of both the potential merits of involvement and the potential risks.

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## THE POLITICS OF INTERNATIONAL ARBITRATION AND ADJUDICATION

*Stephen E. Gent\**

### INTRODUCTION

Disputing states may select from a variety of resolution mechanisms to manage their conflicts—bilateral negotiations, non-binding third-party mediation,<sup>1</sup> or international arbitration and adjudication.<sup>2</sup> Of these mechanisms, arbitration and adjudication have often proven to be the most effective means of producing long-lasting settlements on contentious issues. Despite this fact, evidence indicates that states are generally reluctant to use such legal forms of dispute resolution, especially in resolving issues of national security. To understand when policymakers can and should promote the use of these mechanisms, they need to understand the reasons behind the reluctance of states to use arbitral or legal forums. Recent research provides insight into the political dynamics underlying the use of

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<sup>1</sup> See Kyle Beardsley, [Using the Right Tool for the Job: Leverage and Conflict Resolution](#), 2 PENN ST. J.L. & INT'L AFF. 57 (2013); Scott Sigmund Gartner, [Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds](#), 2 PENN ST. J.L. & INT'L AFF. 27 (2013); J. Michael Greig, [Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation](#), 2 PENN ST. J.L. & INT'L AFF. 48 (2013); Molly M. Melin, [When States Mediate](#), 2 PENN ST. J.L. & INT'L AFF. 78 (2013); Isak Svensson, [Research on Bias in Mediation: Policy Implications](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

<sup>2</sup> U.N. Charter art. 33, para. 1.

international arbitration and adjudication—insights that will aid policymakers charged with resolving such disputes.<sup>3</sup>

International arbitration and adjudication share three general characteristics. First, a third party, not the disputants, determines the terms of any settlement.<sup>4</sup> Second, unlike mediation, states agree to honor the ruling before the third party actually hands down a decision. Finally, the arbitration or adjudication settlements incorporate principles of international law that are not necessarily invoked in other types of negotiations.<sup>5</sup> The two methods primarily differ with respect to the identity of the third party.<sup>6</sup> In arbitration, an individual, state, NGO, or panel of states hands down a decision. On the other hand, adjudication is conducted by an international court, such as the International Court of Justice.

While arbitration and adjudication are often viewed as legal instruments, it is important to view the use of such procedures as being part of a political process. In disputes over contentious issues, states are primarily interested in achieving outcomes that protect their

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<sup>3</sup> See generally Krista E. Wiegand & Emilia Justyna Powell, *Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes*, 55 J. CONFLICT RESOL. 33 (2011); Stephen E. Gent & Megan Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, 55 J. CONFLICT RESOL. 710 (2011); Stephen E. Gent & Megan Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, 28 CONFLICT MGMT. & PEACE SCI. 124 (2011); Stephen E. Gent & Megan Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, 72 J. POL. 366 (2010); Richard B. Bilder, *Adjudication: International Arbitration Tribunals and Courts*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 195-266 (I. William Zartman ed., U.S. Institute of Peace Press rev. ed. 2007); Sara McLaughlin Mitchell & Paul R. Hensel, *International Institutions, and Compliance with Agreements*, 51 AM. J. POL. SCI. 721 (2007); Todd L. Allee, & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 219-234 (2006); Beth Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RESOL. 829 (2002) (describing recent studies in political science on legal dispute resolution of territorial and maritime issues).

<sup>4</sup> Franz Cede, *The Settlement of International Disputes by Legal Means—Arbitration and Judicial Settlement*, in THE SAGE HANDBOOK OF CONFLICT RESOLUTION 358-59 (Jacob Bercovitch et al. eds., 2009).

<sup>5</sup> *Id.* at 360.

<sup>6</sup> See *id.* at 358-75.

own security and economic interests. Thus, even though decisions of arbitration panels or international courts are largely based on legal principles, the initial decision to pursue arbitration or adjudication represents a voluntary, political commitment. The tension inherent in the use of a legal procedure to resolve a political dispute has often constrained the use of arbitration and adjudication in the international system.<sup>7</sup> This article examines how the political frame helps policymakers understand when and why states would be willing to use international arbitration to resolve disputes over contentious issues.

## I. THE EFFECTIVENESS OF ARBITRATION AND ADJUDICATION

Despite a tendency to compare these processes legally to their domestic counterparts, international arbitration and adjudication are carried out in a different environment. Without a global police force, international courts and arbitration panels do not have the same ability to enforce legal rulings as domestic governments. Nevertheless, international arbitration and adjudication have proved remarkably effective. Studies have shown that these legal dispute mechanisms are significantly more successful at resolving international territorial, maritime, and river disputes than other bilateral and third-party conflict management mechanisms.<sup>8</sup> Table 1 presents historical data on the outcome of attempts to settle territorial claims in the Americas and Western Europe collected by the Issue Correlates of War (ICOW) project.<sup>9</sup> Sixty-three percent of the time, arbitration or adjudication ends the claim between the

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<sup>7</sup> JOSEPH PRESTON BARATTA, INTERNATIONAL ARBITRATION: IMPROVING ITS ROLE IN DISPUTE SETTLEMENT 26 (1989). *See generally* F.S. NORTHEGE & MICHAEL D. DONELAN, INTERNATIONAL DISPUTES: THE POLITICAL ASPECTS (1971).

<sup>8</sup> *See* Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 368-69; Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 127-28.

<sup>9</sup> *See generally* Paul R. Hensel, *Contentious Issues and World Politics: The Management of Territorial Claims in the Americas, 1816-1992*, 45 INT'L STUD. Q. 81 (2001); PAUL R. HENSEL & SARA McLAUGHLIN MITCHELL, THE ISSUE CORRELATES OF WAR (ICOW) PROJECT, <http://www.paulhensel.org/icow.html>.

disputants. On the other hand, bilateral negotiations and mediation have a success rate of less than twenty percent. What drives this remarkable difference in success rates?

**Table 1. Effectiveness of Different Conflict Resolution Procedures in Settling Territorial Disputes Between Countries**

	Arbitration and Adjudication	Mediation	Bilateral Negotiations
Did Not End Territorial Dispute	14 (36.8)	116 (81.7)	286 (82.7)
Ended Territorial Dispute	24 (63.2)	26 (18.3)	60 (17.3)
Total	38 (100.0)	142 (100.0)	346 (100.0)

Source: Issue Correlates of War; includes all territorial claims in the Americas and Western Europe, 1816-2001. Percentages in parentheses.

There are several reasons why states are often willing to comply with international arbitration and adjudication despite the lack of traditional law enforcement. First, arbitrators and adjudicators usually use principles of international law as the basis for their decisions. Thus, when a state rejects such a ruling, it is also rejecting well-established legal code. States may respect legal rulings in order to help preserve the general legitimacy of international law. Second, the legality of arbitration and adjudication generates international reputation costs. These rulings are perceived by the rest of the world as being legitimate because they are founded in legal provisions agreed to by the global community.<sup>10</sup> Thus it can damage a country's

<sup>10</sup> See generally Dana D. Fischer, *Decisions to Use the International Court of Justice: Four Recent Cases*, 26 INT'L STUD. Q. 251(1982).

reputation when it chooses to break a binding agreement.<sup>11</sup> Finally, arbitration and adjudication can provide political cover at the domestic level. Domestic constituents and voters may perceive concessions based on international law as being more legitimate than concessions offered in bilateral negotiations.<sup>12</sup> Thus, the arbitral and adjudicative settlements may be more acceptable to a country's population, and disparate constituencies within the country, in the long term than other types of settlements.

## II. THE RELUCTANCE TO USE LEGAL DISPUTE RESOLUTION

While arbitration and adjudication have proven to be highly effective at resolving disputes, states are reluctant to use these procedures. Table 2 presents data on the frequency of different types of settlement attempts of territorial, maritime, and river claims. Arbitration and adjudication combined only make up about six or seven percent of settlement attempts. To understand why methods of international legal dispute resolution are rarely used, one must consider the unique characteristics of these procedures. Unlike bilateral negotiations or other types of third-party diplomatic efforts, arbitration and adjudication require states to give up decision control. Decision control is the "degree to which any one of the participants may unilaterally determine the outcome of the dispute."<sup>13</sup> In binding arbitration or adjudication, an international court or arbitration panel makes the final determination about the terms of any settlement.

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<sup>11</sup> See Mitchell & Hensel, *supra* note 3, at 723-25; Simmons, *supra* note 3, at 843-44.

<sup>12</sup> See Allee & Huth, *supra* note 3, at 222-23; Kyle Beardsley & Nigel Lo, *Third-Party Conflict Management and the Willingness to Make Concessions*, 57 J. CONFLICT RESOL. (forthcoming 2013); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 61-62 (1990).

<sup>13</sup> John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 546 (1978).



**Table 2. Conflict Resolution Attempts by Type and Disputed Issue**

<i>Type of Conflict Resolution Attempt</i>	<i>Type of Disputed Issue</i>			Total Attempts
	Territory	River	Maritime	
Arbitration/Adjudication	38 (7.2)	7 (4.9)	16 (6.0)	61 (6.5)
Other Third-Party Attempt	144 (27.2)	48 (33.3)	89 (3.5)	281 (29.9)
Bilateral Negotiations	348 (65.7)	89 (61.8)	161 (60.5)	598 (63.6)
Total Attempts	530 (100.0)	144 (100.0)	266 (100.0)	940 (100.0)

Source: Issue Correlates of War project. Percentages in parentheses.

The requirement that disputants relinquish decision control makes them reluctant to pursue legal dispute resolution. When deciding whether to pursue legal dispute resolution, states must weigh the trade-off between pursuing an effective conflict management strategy and the costs of ceding decision control to a third party.<sup>14</sup> The following five factors significantly influence the willingness of states to relinquish decision control and pursue arbitration or adjudication:

<sup>14</sup> Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 368-69.

### A. Third-Party Bias

Each party to a dispute will be reluctant to give up decision control to an arbitration panel or court that it believes is biased against its interests.<sup>15</sup> A state may expect that such a biased third party will hand down a ruling that disproportionately favors its adversary. Given that one of the disputants would likely reject any biased third party, disputants are generally only willing to jointly agree to relatively unbiased arbiters or adjudicators.<sup>16</sup>

### B. Salience

States are less willing to cede decision control when negotiating over highly salient issues.<sup>17</sup> An unfavorable ruling on an issue of critical importance would be very costly, as state leaders would be faced with the choice between living with an unpalatable outcome and bearing the costs of reneging on a legal settlement.<sup>18</sup> Given this, it is not surprising that arbitration and adjudication are more commonly used to resolve less salient economic issues such as investment disputes than more salient security issues like territorial control.<sup>19</sup> Moreover, within the universe of territorial and maritime claims, states have been less willing to pursue arbitration or adjudication on highly salient claims, such as those that involve strategically located territory or valuable resources.<sup>20</sup> For example, despite the fact that Colombia and Venezuela have previously used arbitration to resolve a territorial dispute, they have been reluctant to do so over their disputed maritime boundary in Gulf of Venezuela

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<sup>15</sup> *Id.* at 375.

<sup>16</sup> *Id.*

<sup>17</sup> Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 134.

<sup>18</sup> *Id.* at 129.

<sup>19</sup> See Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 730 n.2. See generally Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 124 (2010) (discussing the use of arbitration to resolve investment disputes).

<sup>20</sup> See Gent & Shannon, *Bias and the Effectiveness of Third-Party Conflict Management Mechanisms*, *supra* note 3, at 138.

after the discovery of oil reserves in the 1960s.<sup>21</sup> Similarly, while Malaysia was willing to use the International Tribunal of the Law of the Seas to resolve a maritime dispute with Singapore over land reclamation in 2003, it recently avoided arbitration or adjudication to resolve a disputed claim with Brunei over the rights to offshore oil reserves.<sup>22</sup>

### C. Uncertainty

Uncertainty about potential legal rulings also influences the willingness to pursue arbitration or adjudication.<sup>23</sup> A state will be less inclined to give up decision control if it is highly uncertain as to the terms of the settlement that it should expect from arbitration or adjudication.<sup>24</sup> As the nineteenth-century international law scholar John Bassett Moore noted, “Governments are not in the habit of resigning their functions so completely into the hands of arbitrators as to say, ‘We have no boundaries; make some for us.’”<sup>25</sup> Given this, disputants generally only agree to pursue arbitration or adjudication after they have successfully reached previous functional, procedural, and substantive agreements on the issue at hand that decrease the range of outcomes that could result from legal dispute resolution.<sup>26</sup>

### D. Bargaining Power

The decision to pursue arbitration or adjudication is part of a bargaining process between disputants.<sup>27</sup> On issues of national security, such as territorial conflicts, a state’s bargaining power is

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<sup>21</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 714.

<sup>22</sup> Press Release, Permanent Court of Arbitration, Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Jan. 14, 2005), [http://www.pca-cpa.org/showpage.asp?pag\\_id=1154](http://www.pca-cpa.org/showpage.asp?pag_id=1154).

<sup>23</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 720.

<sup>24</sup> *Id.*

<sup>25</sup> LARS SCHULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* 117 (1998).

<sup>26</sup> Gent & Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, *supra* note 3, at 721.

<sup>27</sup> *Id.*

largely a function of its ability and willingness to pursue its goals through military force.<sup>28</sup> However, once states enter into arbitration or adjudication, this source of power is no longer salient, as the terms of any settlement will instead be a function of the strength of each state's legal claim.<sup>29</sup> Since states with greater capabilities are better able to guarantee favorable outcomes through negotiations or military conflicts, they will be reluctant to opt for legal dispute resolution unless they expect to receive a favorable ruling.<sup>30</sup> For this reason, arbitration and adjudication are less likely when there is a large power asymmetry between disputants.

#### E. Armed Conflict

In general, the costs involved with the militarization of conflict increase the incentive of states to resolve their disputed claims. Thus, it is not surprising that arbitration and adjudication of territorial, maritime, and river claims are more likely when there has been a militarized interstate dispute on the issue in recent years.<sup>31</sup> However, legal dispute resolution is rarely used as part of the peace process of an armed conflict.<sup>32</sup> In these situations, there is often a lack of trust between the disputants that would be necessary for an effective legal procedure.<sup>33</sup> In addition, peace processes usually revolve around multidimensional issues. Thus, disputants are generally reluctant to give up decision control to a legal body during peace negotiations because it reduces their ability to use issue linkage to find a politically acceptable compromise solution to the conflict.

### III. MOVING RELUCTANT STATES TO THE ARBITRAL FORUM

Systematic analysis has shown that arbitration and adjudication can be highly effective methods of resolving contentious

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<sup>28</sup> *Id.* at 719.

<sup>29</sup> *Id.* at 719-20.

<sup>30</sup> *Id.* at 719.

<sup>31</sup> *Id.* at 727.

<sup>32</sup> *Id.* at 713.

<sup>33</sup> See Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 367.

international disputes, but states are often unwilling to pursue such legal procedures. Looking at the choice to pursue arbitration or adjudication as a political decision provides policymakers with concrete strategies to encourage the use of legal dispute resolution. In particular, policymakers should focus on reducing the costs of giving up decision control without undermining the unique benefits of international arbitration and adjudication.

First, policymakers should find the historical shift from arbitration by states to arbitration and adjudication by intergovernmental organizations and courts to be a positive trend. Disputants will likely perceive such organizations and courts as being less biased than state actors, which will decrease the potential costs of giving up decision control. For this reason, policymakers should encourage the use of international courts and instill confidence in the international community that such courts are unbiased. One practical step would be to ensure that the methods used by international courts to select judges for individual cases minimize the possibility of a biased judge, such as a citizen of one of the disputing states.<sup>34</sup>

Second, policymakers can help minimize the costs of giving up decision control by reducing the stakes and the level of uncertainty in arbitration and adjudication. One potential approach to doing this would be to encourage disputants to use incremental or piecemeal binding negotiations to settle portions of their claim.<sup>35</sup> Submitting to arbitration rulings over a series of smaller issues poses less of a risk to disputants than a comprehensive ruling, as it provides the ability to back out at various stages. While such an approach would extend the negotiation process, if it encourages states that would not otherwise do so to enter into a legal dispute resolution procedure, it may prove to be a more effective long-term conflict resolution strategy.

Finally, it is also important to emphasize legal dispute resolution is not a panacea for all conflicts. States have multiple

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<sup>34</sup> Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005).

<sup>35</sup> See Larry N. George, *Realism and Internationalism in the Gulf of Venezuela*, 30 J. INTERAMERICAN STUD. & WORLD AFF. 139, 162 (1988).

avenues—from bilateral negotiations to non-binding mediation to military conflict—to reach settlements over disputed issues.<sup>36</sup> When disputants opt for arbitration or adjudication, they must forgo these other options. Since states with greater bargaining power are able to guarantee themselves favorable outcomes outside of court, they will be reluctant to submit their claims to arbitration or adjudication unless they can expect a similarly favorable outcome. In the maritime dispute with Brunei, Malaysian leaders recognized that they had a weak legal claim and had little chance of a favorable outcome if the case was submitted to arbitration or adjudication.<sup>37</sup> Instead, Malaysia opted for bilateral negotiations in which it was able to use leverage and issue linkage to guarantee itself a future share of the oil and gas revenues in the disputed maritime area.<sup>38</sup>

As mentioned above, a similar desire for flexibility and the need to find compromises over complex, multidimensional issues also makes states reluctant to give up decision control to a legal body during peace negotiations of armed conflicts. The limitations of the use of legal dispute resolution to resolve armed conflict were apparent in the aftermath of the 2000 Algiers Agreement to end the war between Ethiopia and Eritrea, in which the disputants agreed to allow the Permanent Court of Arbitration (PCA) to demarcate their border and arbitrate claims of international law violations.<sup>39</sup> Ethiopia rejected the arbitral decision that awarded the disputed border town of Badme to Eritrea,<sup>40</sup> and the reparations awarded by the PCA were insufficient to resolve the political dispute between the states.<sup>41</sup> Given this, policymakers should focus on more flexible conflict management mechanisms, such as mediation, that allow states to maintain decision control in the immediate aftermath of armed

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<sup>36</sup> See Gent & Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, *supra* note 3, at 372.

<sup>37</sup> *Brunei and KL to Share Oil and Gas Revenue*, THE STAR ONLINE, June 8, 2010, <http://thestar.com.my/news/story.asp?file=/2010/6/8/parliament/6421375>.

<sup>38</sup> *Id.*

<sup>39</sup> Ari Dybnis, Note, *Was the Eritrea—Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict*, 33 LOY. L.A. INT'L & COMP. L. REV. 255, 259, 263 (2011).

<sup>40</sup> *Id.* at 263.

<sup>41</sup> *Id.* at 270-71.

conflict, reserving arbitration and adjudication for situations in which there is a reduced level of tension between the disputants.

In addition, evidence from territorial disputes indicates that states are less likely to comply with legal rulings that do not reflect the underlying balance of power between the disputants.<sup>42</sup> For example, a militarily superior Argentina rejected a 1977 arbitration settlement of its disputed border with Chile in Beagle Channel.<sup>43</sup> Given its power advantage, the Argentine government found the arbitration ruling unacceptable and hoped to achieve a more favorable outcome through other means.<sup>44</sup> Thus, arbitration and adjudication will be most effective when they produce settlements that reflect the political realities on the ground. Understanding these political factors can help policymakers determine when they should promote the use of arbitration and adjudication, as well as when they should turn to alternative methods of conflict management.

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<sup>42</sup> See STEPHEN E. GENT & MEGAN SHANNON, BARGAINING POWER AND THE USE OF INTERNATIONAL ARBITRATION AND ADJUDICATION 15-16 (Mar. 13, 2011) (unpublished manuscript) (on file with International Studies Association). This version of this paper was presented at the 2011 annual meeting of the International Studies Association in Montreal, Canada (Mar. 16-19, 2011).

<sup>43</sup> See DAVID R. MARES, VIOLENT PEACE: MILITARIZED INTERSTATE BARGAINING IN LATIN AMERICA 136-37 (2001).

<sup>44</sup> See *id.* at 137-38.

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## WHEN STATES MEDIATE

*Molly M. Melin\**

### INTRODUCTION

The use of mediation for conflict resolution is not a new process. The first recorded mediation efforts occurred in 209 B.C., when Greek city-states helped the Aetolian League and Macedonia produce a truce in the first Macedonian war. Since then, mediation has been increasingly employed as a tool for peacefully resolving conflict.<sup>1</sup> The International Conflict Management Dataset<sup>2</sup> reports 1334 mediation attempts by states in 333 interstate and civil conflicts since World War II, with more than half of the mediation efforts occurring since the end of the Cold War.<sup>3</sup> States represent the most

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<sup>1</sup> The benefits of successful mediation are widespread. Consider the case of the Northern Irish “Troubles.” Beginning with the Good Friday Accords and continuing with the work of non-governmental organizations (NGOs) in mediating interpersonal disputes, the relative peace in Northern Ireland today is a testament to the power of a well-orchestrated and sustained mediation effort.

<sup>2</sup> JACOB BERCOVITCH, THE INTERNATIONAL CONFLICT MANAGEMENT DATASET: OFFICIAL CODEBOOK FOR THE INTERNATIONAL CONFLICT MANAGEMENT DATASET (1999); J. MICHAEL GREIG & PAUL F. DIEHL, INTERNATIONAL MEDIATION 31 (2012). The International Conflict Management dataset was compiled by Professor Jacob Bercovitch in the late 1990s and focuses on the mechanisms used in international conflict management. JACOB BERCOVITCH, VICTOR KREMENYUK & I. WILLIAM ZARTMAN, THE SAGE HANDBOOK OF CONFLICT RESOLUTION 570 (2008) (defining international conflict as “organised and continuous militarized conflict, or a demonstration of intention to use military force involving at least one state.”).

<sup>3</sup> BERCOVITCH, *supra* note 2, at 31.



common type of political actor willing to serve as a mediator in international dispute resolution—a category often referred to as “state-led” mediation. Not all states, however, volunteer to serve as mediators and not all disputes receive mediator assistance. This essay examines the drivers of such choices and suggests factors that policymakers should consider when assessing whether to engage in state-led mediation.

An understanding of these factors will help policymakers generate expectations about which states are likely to have an interest in mediating conflicts (and can be successfully encouraged to do so), and which disputants are likely to accept state-led mediation offers (thereby avoiding the loss of face associated with rejection). The objective of this exercise is to assist the policymaker in identifying the circumstances where state-led mediation will have a positive and permanent influence on long-term peace. Section I of the paper describes the role states play in the mediation process, both in terms of the broader spectrum of mediators and in terms of involvement frequency. Section II discusses the conditions that facilitate state-led mediation efforts, and the conclusion offers recommendations for achieving more effective state-led mediation efforts.

#### I. THE STATE AS PEACEMAKER—A STRATEGIC CHOICE?

There are four main types of mediators: international organizations (*e.g.*, the United Nations), regional governmental organizations (*e.g.*, the Arab League), individuals (*e.g.*, former United States President Jimmy Carter), and states (*e.g.*, New Zealand). States are the most common mediator and the focus of this paper.<sup>4</sup> Mediation works differently across mediator types. Of particular

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<sup>4</sup> For work on mediation involving regional organizations, see generally Scott Sigmund Gartner, *Signs of Trouble: Regional Organization Mediation and Civil War Agreement Durability*, 73 J. POL. 380 (2011). For work on international organizations, see generally Holley E. Hansen, Sara McLaughlin Mitchell & Stephen C. Nemeth, *IO Mediation of Interstate Conflicts: Moving Beyond the Global versus Regional Dichotomy*, 52 J. CONFLICT RESOL. 295 (2008); Megan Shannon, *Preventing War and Providing the Peace? International Organizations and the Management of Territorial Disputes*, 26 CONFLICT MGMT. & PEACE SCI. 144 (2009).

note, the motivations of states for offering mediation assistance differ from those of the other actors.<sup>5</sup>

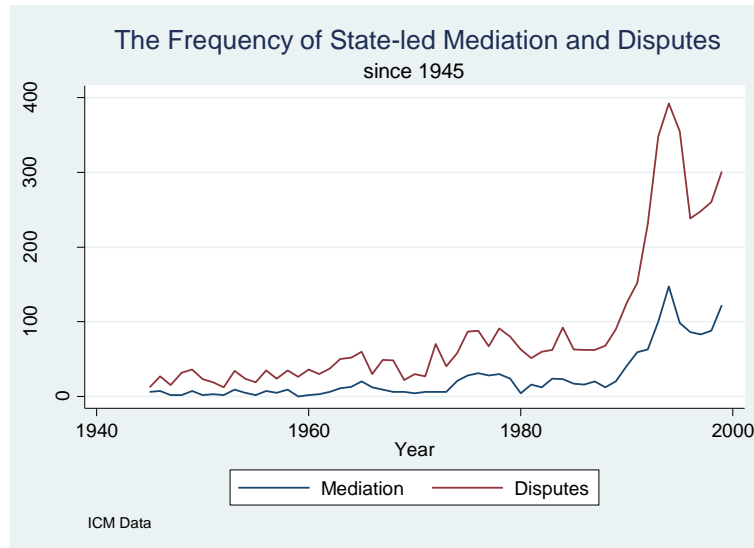
States carefully consider when and where they mediate, and often consider the strategic benefits when deciding whether to take on the mediator role. Potential gains include establishing a reputation as a peacemaker (as have Norway and Sweden) and enhancing the state's influence in the dispute's outcome, either by changing an unfavorable situation or maintaining a favorable status quo. Understandably, states are more likely to take up the role of mediator if it will expand their influence, resources, and power. Figure 1 depicts the number of conflicts and state-led mediation efforts over time.<sup>6</sup> While the number of mediation efforts per year closely follows the number of disputes per year, the two lines never intersect—a characteristic I explore further below.

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<sup>5</sup> For example, international organizations often include peacemaking as a part of their charter (*e.g.*, the African Union and Organization of American States), but frequently must overcome political struggles between members before mediation can occur. Conversely, state mediators often struggle to establish impartiality given their significant stake in the outcome of the mediation efforts. States also have more policy instruments at their disposal than international organizations, allowing for greater variation in reactions to external conflict—most notably, joining the conflict in support of one side, an unlikely occurrence when an international organization leads mediation.

<sup>6</sup> BERCOVITCH, *supra* note 2, at 31.

**Figure 1. The Occurrence of Disputes and State-Led Mediation Efforts, 1945-1999**



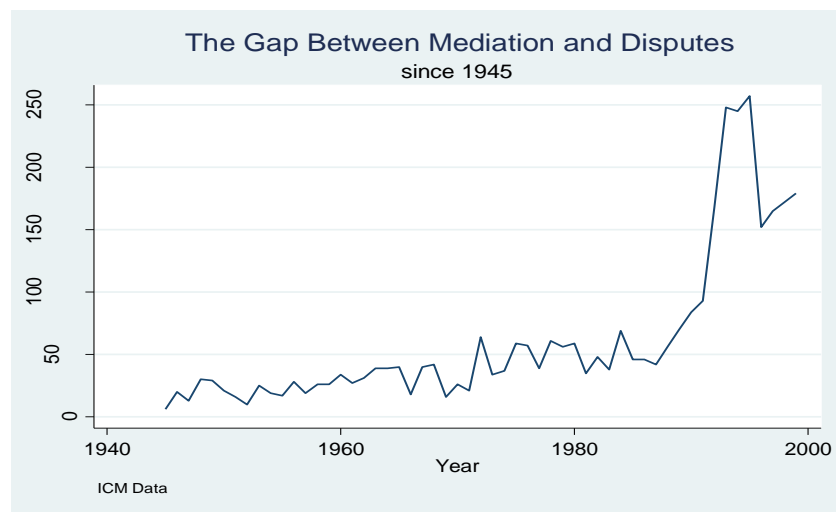
The figure also contains information about state-led mediation decisions. There are at least two possible ways to explain mediation occurrence. First, it is possible to think of states as a population of mediators that indiscriminately mediate any disputes that arise. Although this description may seem extreme, it is not far from popular beliefs about the obligations of the Great Powers. The global community often views states with large capabilities as being obligated to respond to instances of extreme violence. The second explanation sees mediation as resulting from strategic calculations. In this case, states do not indiscriminately mediate, but rather consider the costs and benefits before agreeing to do so.

If the former proposition is correct, the supply of mediators would remain relatively constant. And if the supply of mediators was constant, we would observe stability in the number of mediation efforts. Years with many conflicts would likely experience mediator supply problems with a large gap between the number of disputes and the number of mediation efforts. In years with fewer disputes, most disputes would be mediated. The data, however, does not seem to support the proposition that Great Powers feel any significant

obligations to mediate by virtue of their leadership role in the global community.

Indeed, a further unpacking of the data seems to endorse the latter view—that a state’s decision to serve as a mediator is the result of strategic calculations. Figure 2 graphs the gap between the two lines from Figure 1, showing the variation in the number of disputes that go without state-led mediation. There is no year for which all disputes are mediated by states (no matter how few disputes are observed), and there is variation in the percent mediated—both provide evidence that states make strategic mediation choices.

**Figure 2. The Gap Between the Number of Conflicts and Mediation Occurrence, 1945-1999**



## II. IDENTIFYING THE OPTIMAL CONDITIONS FOR STATE-LED MEDIATION

Unlike sanctions or military intervention, a prerequisite to the occurrence of mediation is the acceptability of mediation to all involved parties. An often cited definition of mediation highlights this characteristic, describing mediation as “a reactive process of conflict management whereby parties seek the assistance of, or accept an offer of help from, an individual, group, or organization to change their behavior, settle their conflict, or resolve their problem without

resorting to physical force or invoking the authority of the law.”<sup>7</sup> Generally, political or economic ties between a potential mediator and the disputants increase the occurrence of mediation.<sup>8</sup> These ties generate state interest in conflict resolution, and often translate into leverage at the negotiating table.<sup>9</sup> The remainder of this essay explores the conditions that increase mediation occurrence (both in terms of state willingness to mediate and in terms of belligerents accepting state-led mediation) and success, as summarized in Table 1.

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<sup>7</sup> Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* 11, 13 (Jacob Bercovitch ed., 1996).

<sup>8</sup> Ties that affect mediation offers and acceptance include trading partnerships, alliances, physical proximity, and even former colonial ties. For an in-depth analysis of how ties affect mediation and conflict management behavior, see generally Molly M. Melin, *The Impact of State Relationship on If, When, and How Conflict Management Occurs*, 55 INT’L STUD. Q. 691 (2011).

<sup>9</sup> For more on mediator leverage see Kyle Beardsley, [Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution](#), 2 PENN ST. J.L. & INT’L AFF. 57 (2013).

**Table 1. Summary of Factors that Affect Mediation**

<b>Explanatory Variable</b>	<b>Effect on Mediation Occurrence</b>	<b>Effect on Mediation Outcome</b>
<i><b>Regime Type</b></i>	Democracy increases mediation occurrence	Democracy increases mediation success
<i><b>Third-Party Capabilities</b></i>	Capable mediators increase mediation occurrence	Capable mediators increase mediation success
<i><b>Conflict Costs</b></i>	Violence increases mediation occurrence	Violence increases mediation success
<i><b>Rivalries &amp; Reoccurring Conflict</b></i>	Rivalries & reoccurrence increases mediation occurrence	<i>not observed</i>
<i><b>Mediation History</b></i>	Previous mediation increases mediation occurrence	<i>not observed</i>
<i><b>Conflict Stalemate</b></i>	Stalemate increases mediation occurrence	<i>not observed</i>
<i><b>Conflict Nature</b></i>	International conflicts increase mediation occurrence	<i>not observed</i>

#### A. Regime Type

Regime type plays an important role in the frequency and likely success of mediation. Regime type, or form of government, can encourage mediation and its success at several levels. Mediation and accepting offers of mediation are more likely when democracies are involved, as these states are accustomed to third-party involvement in conflict and garner other states' trust, making them a more attractive option for conflict resolution.<sup>10</sup> Democratic third parties are more

<sup>10</sup> Mark J.C. Crescenzi, Kelly M. Kadera, Sara McLaughlin Mitchell & Clayton L. Thyne, *A Supply Side Theory of Mediation*, 55 INT'L STUD. Q. 1069, 1084-85 (2011).

likely to be accepted as mediators, democratic disputants are more likely to accept mediation, and a democratic international community increases mediation use. Democratic disputants are more accepting of mediation because their populace is accustomed to third-party involvement in domestic conflicts, thus lowering the political costs of mediation acceptance.<sup>11</sup> A strong democratic community globally encourages even non-democracies to adopt the behavior of democracies, such as employing third-party resolution, which increases the use of mediation.<sup>12</sup> A shared democratic culture between disputants and the mediator is more likely to generate an agreement, as democracies employ negotiation and compromise in disputes with other democracies but distrust the intentions of non-democratic states and are less willing to rely on techniques of peaceful conflict resolution in those conflicts.<sup>13</sup> Mediation is therefore best encouraged when democracies are involved as disputants and mediators. An apt illustration of this principle in action was Turkey's willingness to work with British and American mediators following the 2010 Gaza-bound flotilla incident. As democratic norms continue to spread, state-led mediation will be increasingly employed to resolve disputes.

### B. Third-Party Capabilities

States (or third parties) with material strength and diplomatic prowess are likely to be accepted and successful as mediators because these actors have access to resources and negotiating experience that makes them attractive as mediators and able to create and sustain peace. Before a state can act, however, it must have the capabilities necessary to be effective as a mediator.<sup>14</sup> Mediation is therefore more likely when capable third parties have interests in involvement, as these actors have the ability to be involved. While capable third parties are certainly not always successful (consider Kofi Annan's

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<sup>11</sup> James A. Wall Jr., John B. Stark & Rhett L. Standifer, *Mediation: A Current Review and Theory Development*, 45 J. CONFLICT RESOL. 370, 372-3 (2001).

<sup>12</sup> See generally Sara McLaughlin Mitchell, *A Kantian System? Democracy and Third-Party Conflict Resolution*, 46 AM. J. POL. SCI. 749 (2002).

<sup>13</sup> Russell J. Leng & Patrick M. Regan, *Social and Political Cultural Effects on the Outcomes of Mediation in Militarized Interstate Disputes*, 47 INT'L STUD. Q. 431, 435 (2003).

<sup>14</sup> Melin, *supra* note 8, at 706.

efforts in Syria), their capabilities and reputation mean they are likely to be deemed “acceptable” to the disputants.<sup>15</sup> Mediators with material capabilities can incentivize agreements by using the proverbial carrot and stick to increase an agreement’s appeal or threaten failed compliance.<sup>16</sup> For example, the Great Powers are often actively involved in conflict management, as was the case with European and Chinese involvement in Darfur. In selecting third parties with the assets necessary to create and enforce peace, policymakers can encourage mediation and its success.

### C. Conflict Costs

The more costly a conflict is in terms of violence, the more likely it is to be “ripe” for state-led mediation.<sup>17</sup> The increased international pressure and the disputants’ cost-benefit calculus create an appealing climate for state-led mediation efforts. Costly conflicts generally attract international interest. The international spotlight offers a state mediator the opportunity to gain in terms of reputation and influence. For example, New Zealand benefited from an enhanced regional role after successfully mediating the Bougainville conflict,<sup>18</sup> as did Switzerland in bringing peace between the Algerian independence movement and the French government.<sup>19</sup> Disputants also are more likely to accept mediation offers as the cost of conflict increases because increasing costs impact the disputants’ assessment

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<sup>15</sup> For work on the challenges of mediation in Syria, see J. Michael Greig, *Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*, 2 PENN ST. J.L. & INT’L AFF. 48 (2013).

<sup>16</sup> Kyle C. Beardsley et al., *Mediation Style and Crisis Outcomes*, 50 J. CONFLICT RES. 58, 83 (2006).

<sup>17</sup> See generally I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* (1985).

<sup>18</sup> See Scott Sigmund Gartner, *Civil War Peacemaking*, in *PEACE AND CONFLICT 2012: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY* 71, 78 (J. Joseph Hewitt et al. eds., 2012). See generally REBECCA ADAMS, *PEACE ON BOUGAINVILLE: TRUCE MONITORING GROUP* (2001); *BOUGAINVILLE BEFORE THE CONFLICT* (Anthony J. Regan & Helga M. Griffin eds., 2005); MONICA WEHNER & DONALD DENOON, *WITHOUT A GUN: AUSTRALIANS’ EXPERIENCES MONITORING PEACE IN BOUGAINVILLE, 1997-2001*, 43-48 (2001).

<sup>19</sup> See generally JOHN RUEDY, *MODERN ALGERIA: THE ORIGINS AND DEVELOPMENT OF A NATION* (2005).



of whether continued death, destruction and expenditures are worth achieving their initial objective. Furthermore, state mediators can expect fewer actions will be required to resolve costly conflicts, given the high cost of continued conflict.<sup>20</sup>

Increased costs also increase mediation success rates, as state party mediators can provide domestic political cover and enable leaders to agree to otherwise unacceptable terms.<sup>21</sup> This was the case in Sinai (1974), El Salvador (1988), and Mozambique (1992). In highlighting the low costs and potential benefits of state-led mediation, policymakers can encourage state actors to offer and accept mediation.

#### D. Rivalries and Reoccurring Conflict

States may be more likely to accept mediation offers when the disputants are strategic rivals or view each other as threatening competitors.<sup>22</sup> Such conflicts tend to be recurring, and especially destabilizing and violent—not only to the disputants but to third-party state actors either located in the region or with other strong relationships to the disputants. These rivalries also tend to gain greater international attention. On first blush, these characteristics may make an offer to mediate unappealing to a state actor. Policymakers, however, should take care to note the considerable potential benefits of accepting the offer: the state party's interest in building its reputation and in avoiding the costs associated with a regionally destabilizing, violent and drawn-out conflict. Said another way, although there is some risk in taking on the mediator role in such circumstances, the risks of declining such an invitation may be even greater. The illustrations for this factor show both sides of the

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<sup>20</sup> Lesley G. Terris & Zeev Maoz, *Rational Mediation: A Theory and a Test*, 42 J. PEACE RES. 563, 579-80 (2005) (arguing “the greater the versatility of the conflict, (1) the more likely are disputants to seek mediation, (2) the more likely are outside parties to mediate, and (3) the more intrusive the mediation strategies employed.”).

<sup>21</sup> Kyle Beardsley, *Pain, Pressure and Political Cover: Explaining Mediation Incidence*, 47 J. PEACE RES. 395, 404 (2010).

<sup>22</sup> Jacob Bercovitch & Paul F. Diehl, *Conflict Management of Enduring Rivalries: The Frequency, Timing, and Short-Term Impact of Mediation*, 22 INT'L INTERACTIONS 299, 316 (1997).

calculation. While President Jimmy Carter's efforts between Egypt and Israel produced the still-intact Camp David Accords, mediation efforts between India and Pakistan and on the Korean Peninsula have been less successful.

#### E. Mediation History

States are more likely to agree to serve as mediators, and the mediation is more likely to be successful, when the disputants and the state have previously engaged in mediation. These prior mediation experiences, or mediation history, establish rapport and signal a commitment to peaceful conflict management. Mediation efforts are not isolated events. Each instance creates a mediation history of the state's experience as a mediator and the disputants' experiences in working with mediators. In this broader process, previous mediation encourages future efforts and success.<sup>23</sup> Previous disputant experiences with mediation signals a disputant's willingness to work with an outsider and encourages mediation offers by states. For example, mediation was employed repeatedly in Yugoslavia, because the parties had signaled they were willing to meet and negotiate, and the mediator established trust and rapport with the belligerents. A state's mediation experience can signal to disputants the mediator's ability, preferred methods, resourcefulness, and objectives.<sup>24</sup> To be effective, the state mediator must be perceived as having access to suitable techniques for encouraging bargaining, and as having sufficient authority and experience to be able to utilize them. Consider Sweden and Norway's reputation as purveyors of peace based on their history of mediation successes. Policymakers can encourage mediation by involving experienced third-party state mediators, especially when the disputants have exhibited openness to mediation.

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<sup>23</sup> J. Michael Greig, *Stepping into the Fray: When Do Mediators Mediate?*, 49 AM. J. POL. SCI. 249, 255 (2005).

<sup>24</sup> Oliver Richmond, *Devious Objectives and the Disputants' View of International Mediation: A Theoretical Framework*, 35 J. PEACE RES. 707, 713 (1998).

## F. Conflict Stalemate

Disputants sensing a conflict stalemate or seeing the improbability of winning are likely to accept state-led mediation as it offers a viable alternative to continued conflict. “When parties find themselves locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degrees or for the same reasons), they seek a way out.”<sup>25</sup> Disputants that have reached a hurting stalemate are “ripe” for mediation, since they cannot envision a successful outcome or an end to unbearable costs if they continue current strategies. Mediation offers a “way out” of an increasingly costly conflict. Henry Kissinger (under U.S. President Nixon) highlighted the notion of a stalemate in the Sinai withdrawal negotiations,<sup>26</sup> as did Chester Crocker (under U.S. President Reagan) in Angola.<sup>27</sup> Similarly, policymakers can encourage disputants to accept mediation by highlighting the presence of a stalemate and the futility of further escalation.

## G. Nature of the Conflict

The international or domestic nature of the conflict has important implications for the effectiveness of the mediation effort as the cost of involving mediators varies between civil and international wars. Mediation is less likely in civil wars as it transfers legitimacy to the non-state actor and can hinder state sovereignty. In effect this means the political costs associated with accepting international mediation will be substantially higher in civil wars.<sup>28</sup> States therefore only accept mediation in the most serious civil

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<sup>25</sup> I. William Zartman, *Ripeness: The Hurting Stalemate and Beyond*, in INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 225, 228 (Daniel Druckman & Paul C. Stern eds., 2000).

<sup>26</sup> See *Briefing by Secretary of State Dr. Henry Kissinger on Sinai Agreement: Hearing Before the H. Comm. on Armed Services*, 94th Cong. 5 (1975).

<sup>27</sup> See *Angola: Options for American Foreign Policy: Hearing Before the Committee on Foreign Relations*, 99th Cong. 3-6 (1986).

<sup>28</sup> Molly M. Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 INT’L INTERACTIONS 249, 254 (2009). For work on civil wars and the role of veto players, see David E. Cunningham, [\*Who Should Be at the Table?: Veto Players and Peace Processes in Civil War\*](#), 2 PENN ST. J.L. & INT’L AFF. 38 (2013).

disputes, or when the benefits of peace outweigh the costs of legitimizing an opponent. For example, Swedish opposition leader Olof Palme was immediately recognized as a mediator in the war between Iran and Iraq, but the Sri Lankan government took 17 years to allow outside involvement with the Liberation Tigers of Tamil Eelam (LTTE). Given this fear of legitimizing opponents, third-party mediation offers are more likely to be accepted in international conflicts. States seeking to mediate civil conflicts will need to highlight other incentives, such as potential costs, before mediation is accepted.

### CONCLUSION

State mediators can have a significant impact on the creation of a stable and sustainable peace. However, states should be selective in deciding when and where to mediate—as such, the policymakers tasked with this portfolio should be cognizant of the optimal circumstances for state-led mediation. Threshold considerations include the characteristics of the state, the nature and characteristics of the conflict, and the characteristics of the disputants. The ideal state mediator will have prior mediation experience, democratic governance structures and access to the resources necessary to enforce agreements. Democratic third parties and disputants are more likely to agree to mediation and to generate an agreement. Experienced mediators are more likely to be accepted, as are those with greater capabilities and resources. Mediators that lack resources and diplomatic experience and those from non-democracies are less likely to be accepted or generate lasting peace. While policymakers have less ability to influence the conflict characteristics, they can encourage mediation by highlighting the presence of a stalemate, the potential for escalation, and the costly nature of the conflict. By carefully considering the appropriateness of mediation and highlighting its benefits, states and disputants are more likely to employ mediation as a conflict management tool for crafting a lasting peace.

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## ETHNIC CONFLICT: AN ORGANIZATIONAL PERSPECTIVE

*Victor Asal & Jonathan Wilkenfeld\**

### INTRODUCTION

To talk about the behavior of others is to generalize<sup>1</sup> especially if that behavior is perceived to be negative.<sup>2</sup> As researchers who have studied ethnic discrimination and ethnic conflict for close to two decades, we have noticed, anecdotally at least, that this penchant for generalization is rampant in discussions of ethnic politics. Newspapers are not the only forum in which one will find articles that talk about one or another ethnic group's involvement in violence without specifying a political organizational agent—by which we mean groups with a set of political goals along with an organizational structure. If an organization is mentioned, the article often offers a generalization about the use of violence or the

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<sup>1</sup> See generally Eric Hoyle, *The Professionalization of Teachers: A Paradox*, 30 BRIT. J. EDUC. STUD. 161 (1982).

<sup>2</sup> See generally Wouter Vanhouche & Joseph W. Alba, *Generalizing from Negative Experiences*, 26 INT'L J. RES. MARKETING 238 (2009).

behavior of an entire ethnic group based solely on the characteristics of one organization within that ethnic group. This problematic type of analysis is too often present in policy and academic journals as well.

The problem of generalizing ethnic behavior becomes more pronounced when one examines the attribution of a particular behavior to a group over time. For example, take the statement that the “Kurds have always rebelled against Turkey,”<sup>3</sup> which is problematic for many reasons since not all Kurds have ever rebelled—as many Kurds would tell you. Certain organizations that claim to represent the Kurds have rebelled for extended periods of time while others have not. Generalizations about the Palestinians provide a more extreme example: “Historical circumstances have changed over the years, but *the Palestinians have always* seemed to prefer the hopes of annihilating Israel in concert with Arab states, or the romance of violent struggle, to constructive accommodation”<sup>4</sup> (emphasis added). Is this the desire of some Palestinians? Yes, disturbingly so, as some surveys suggest.<sup>5</sup> Is this the desire of all Palestinians? No, and polls continuously provide evidence that this is not the case. For example, consider the polls from the Oslo process where “monthly CPRS polls show an increase in general public support for the ‘peace camp,’ from thirty-nine percent in January 1994 to fifty-five percent in October 1995.”<sup>6</sup>

This kind of generalization is a serious obstacle to understanding conflicts and identifying solutions because it prevents policymakers and academics from getting at the messy reality of ethnic politics—especially when they become contentious or violent. Generalizations are even more problematic when the goal is to identify the implications of different policies. Although the Kurds,

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<sup>3</sup> Dilara Sezgin & Melissa A. Wall, *Constructing the Kurds in the Turkish Press: A Case Study of Hürriyet Newspaper*, 27 MEDIA, CULTURE & SOC’Y 787, 788 (2005).

<sup>4</sup> Saul Smilansky, *Terrorism, Justification, and Illusion*, 114 ETHICS 790, 796 (2004).

<sup>5</sup> See generally Stuart J. Kaufman, *Narratives and Symbols in Violent Mobilization: The Palestinian-Israeli Case*, 18 SEC. STUD. 400 (2009).

<sup>6</sup> Khalil Shikaki, *The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine*, 25 J. PALESTINE STUD. 5, 7 (1996).

Palestinians, Druze and other ethnic groups each have a shared identity, “ethnic groups” do not make policy decisions and are not monolithic wholes. Rather, it is the individuals and organizations within the ethnic groups that initiate political behavior. Accordingly, we must recognize that organizations are much more flexible about the behaviors they are willing to embrace than generalizations permit.

Using a dataset of 118 ethnopolitical organizations in the Middle East and North Africa spanning the period 1980-2004, this article analyzes the enormous variance in behavior among and between organizations claiming to represent the same ethnic group. It also will show how such organizations often change their policies and shift back and forth between violent and nonviolent strategies, occasionally adopting both at the same time. While this article does not focus on the larger question of which policies make organizations more likely to move in one direction or another, it illustrates the importance of avoiding over aggregation when studying contentious politics. In the process, this article provides a counter-balance to generally accepted wisdom concerning the relationship between ethnicity and conflict.

#### I. ORGANIZATIONAL BEHAVIOR CAN CHANGE: THE MAROB DATASET

The Minorities at Risk Organizational Behavior (MAROB) dataset<sup>7</sup> examines organizations that represent Minorities at Risk groups.<sup>8</sup> The 118 organizations included in the MAROB dataset include twenty two ethnopolitical groups in sixteen countries of the Middle East and North Africa, operating between 1980 and 2004.<sup>9</sup>

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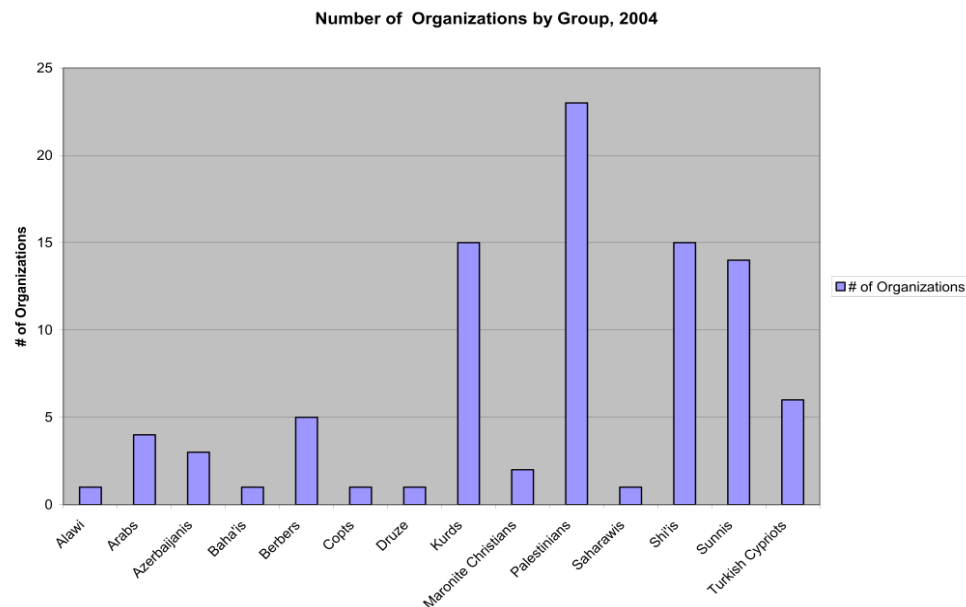
<sup>7</sup> Victor Asal, Amy Pate & Jonathan Wilkenfeld, *Minorities at Risk Organizational Behavior Data and Codebook*, MINORITIES AT RISK PROJECT (Sept. 2008), [http://www.cidcm.umd.edu/mar/data/marob/me\\_marob\\_sept08\\_codebook.pdf](http://www.cidcm.umd.edu/mar/data/marob/me_marob_sept08_codebook.pdf).

<sup>8</sup> Center for International Development and Conflict Management, *Minorities at Risk Dataset*, MINORITIES AT RISK PROJECT (Nov. 2010), <http://www.cidcm.umd.edu/mar/data.asp>.

<sup>9</sup> Data collection is currently underway on the Terrorism and Extremist Organizations (TEO) Database, which will update much of the MAROB Middle East dataset through 2010. Victor Asal, R. Karl Rethemeyer & Jonathan

To be included in the dataset, the organization must not have been created by a government, must claim to represent an ethnic group, must be active at least at the regional level and exist for at least three years.<sup>10</sup> Table 1 provides a breakdown from 2004 of the number of Middle Eastern and Northern African organizations in the dataset by ethnic group.<sup>11</sup>

**Table 1. Organizations in the MAROB Dataset in 2004 by Ethnic Group**



Highly different organizations frequently claim to represent the same ethnic group. Table 2 lists two ethnic groups, Kurds in Turkey and Palestinians in Jordan, and a sample of the organizations

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Wilkenfeld, *Terrorist and Extremist Organizations* (2012) (data collection will be completed by 2015).

<sup>10</sup> See Asal et al., *supra* note 7.

<sup>11</sup> Other contributions to this issue of the *Penn State Journal of Law & International Affairs* also focus on the challenges presented by multiple organizations' participation in conflict and violence. See, e.g., David E. Cunningham, *Who Should Be at the Table?: Veto Players and Peace Processes in Civil War*, 2 PENN ST. J.L. & INT'L AFF. 38 (2013); J. Michael Greig, *Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*, 2 PENN ST. J.L. & INT'L AFF. 48 (2013).

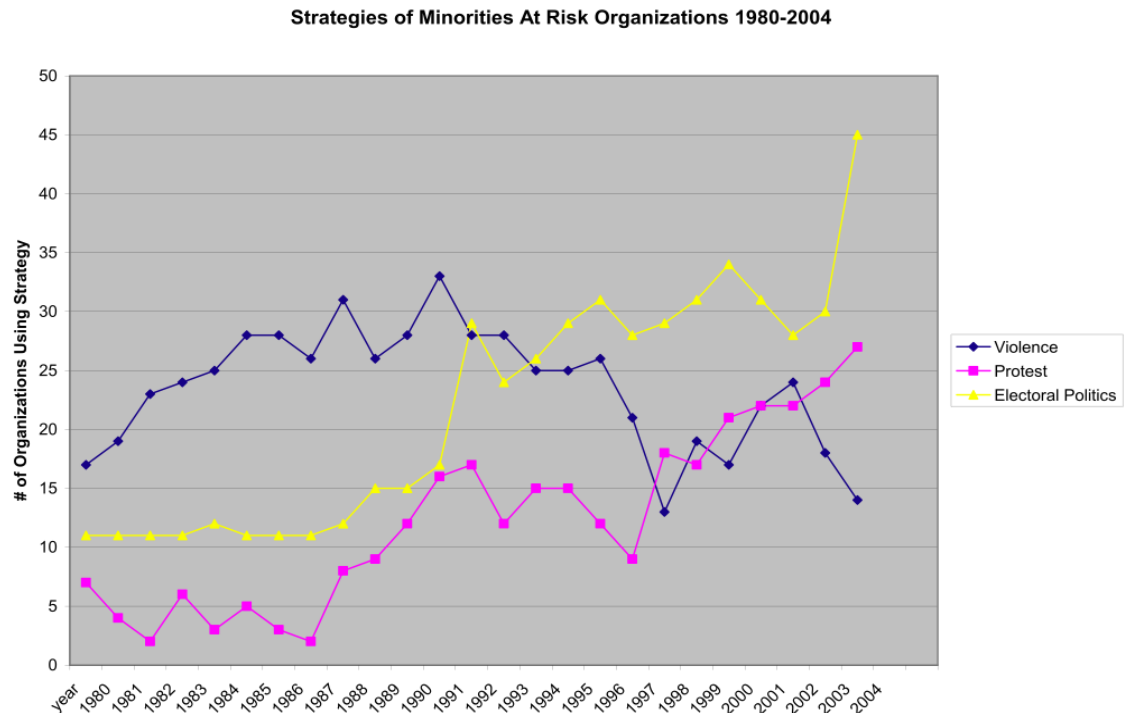


that claim to represent them. For example the Partiya Karkari Kurdistan, which claims to represent the Kurds, has used violence for every year in the dataset while the Halkin Emek Partisi and the Kurdistan Ulusal Kurtulus Partisi never used violence during this time period. The same diverse strategic picture can be seen if we look at the Palestinian organizations in Jordan. The Jordanian People's Democratic Party, which was a spinoff of the Democratic Front for the Liberation of Palestine, has not used violence since its founding in 1989, while the Black September Organization used violence for all but one year of its existence in Jordan between 1984 and 1988. To uniformly label the Kurdish or the Palestinian ethnic groups as violent represents a gross distortion of reality.

**Table 2. Examples of Minority at Risk Groups and MAROB Organizations**

Minority at Risk Group	MAROB Organizations
Kurds in Turkey	Partiya Karkari Kurdistan (PKK) Halkin Emek Partisi Kurdistan Ulusal Kurtulus Partisi
Palestinians in Jordan	Jordanian People's Democratic Party Black September Organization

An examination of general behavior trends for the region over time reveals several observations about the ethnopolitical organizations claiming to represent MAR groups in the Middle East. First, a very large proportion of the organizations used violence in any given year (Table 3). That is, for an extended period of time more than twenty percent of the organizations in the dataset used violence in the same year, and in some years the number shot up past thirty percent.

**Table 3. Strategies of Ethnopolitical Organizations 1980-2004**

Of course, organizations can engage in more than one activity at the same time. If terrorism is defined as the intentional targeting of civilians, then clearly Hamas is a terrorist organization. If insurgency is defined as an organization that shoots soldiers, then Hamas is not only a terrorist organization but also an insurgency. But as Table 4 illustrates, Hamas is not solely a violent organization. It also spent some of its time involved in electoral politics, and by 1994 was active in education, propaganda and in providing social services. This is not to say that Hamas is not a terrorist organization but it does show that Hamas is complex and acts as more than just a terrorist organization. Understanding that Hamas has a larger presence is a starting point for gaining a better understanding of why part of the Palestinian public might have very strong concrete reasons for being loyal to Hamas beyond its policies as they relate to Israel.

**Table 4. Political Behavior of Hamas, 1987-2004**

Year	Attack Civilians	Attack Security Forces	Provide Social Services	Education and Propaganda	Involved in Electoral Politics
1987	no	no	not used	not used	not used
1988	no	yes	not used	infrequent	not used
1989	yes	yes	unclear	infrequent	frequent
1990	yes	yes	unclear	infrequent	not used
1991	yes	yes	unclear	frequent	frequent
1992	yes	yes	infrequent	frequent	infrequent
1993	yes	yes	infrequent	frequent	infrequent
1994	yes	yes	frequent	frequent	infrequent
1995	yes	yes	frequent	frequent	infrequent
1996	yes	yes	frequent	frequent	frequent
1997	yes	yes	frequent	frequent	not used
1998	yes	yes	frequent	frequent	not used
1999	yes	yes	frequent	frequent	not used
2000	yes	yes	frequent	frequent	not used
2001	yes	yes	frequent	frequent	not used
2002	yes	yes	frequent	frequent	not Used
2003	yes	yes	frequent	frequent	not used
2004	yes	yes	frequent	frequent	infrequent

Despite its other efforts, Hamas has clearly made a choice to embrace violence in general and target civilians specifically as a central part of its policy, as shown by the organization's involvement in attacks against civilians every year since 1989. There is in this chart, though, a hint of the fact that organizations make choices about their strategies and that those choices can change or be influenced. In 1987 Hamas did not use violence at all. In 1988 they moved into the realm of violent politics but the organization did not target civilians. Something happened in 1988 and the organization embraced the targeting of civilians. This change over three years suggests that organizations make strategic choices about violence and those choices can change over time. One might argue that it is not so

complicated and is simply an escalation of violence—but that reasoning would be a mistake. Terrorism is called the “weapon of the weak” not only because some people are trying to validate reprehensible behavior. Shooting a civilian without a weapon is a lot easier than shooting a soldier with one. As Martha Crenshaw so trenchantly pointed out:

The observation that terrorism is a weapon of the weak is hackneyed but apt. At least when initially adopted, terrorism is the strategy of a minority that by its own judgment lacks other means. When the group perceives its options as limited, terrorism is attractive because it is a relatively inexpensive and simple alternative, and because its potential reward is high.<sup>12</sup>

This remark suggests that Hamas’s move to begin attacking civilians was not simply an escalation but a choice about what it was willing to do, and a statement that it reached a point where intentionally killing unarmed civilians was acceptable; collateral damage is a different issue. If an organization chooses to move toward killing civilians, this suggests that an organization can choose to move away from such behavior as well.<sup>13</sup> For example, Amal in Lebanon fits this category. Before 1989 Amal regularly engaged in terrorist tactics. From 1989 on, it did not engage in intentional attacks against civilians, but it continued to engage in attacks against military personnel during the entire time period. Some organizations flip back and forth on a regular basis. As Table 5 shows, the Palestinian Fatah Revolutionary Council based in Lebanon went back and forth repeatedly between using terrorist tactics to not using such tactics, to ending the use of violence entirely, to then going back to its use.

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<sup>12</sup> Martha Crenshaw, *The Causes of Terrorism*, 13 COMP. POL. 379, 387 (1981).

<sup>13</sup> For a discussion of Hamas as well as other extremist organizations use of mixed tactics (violent and non-violent), see Kristine Höglund, *Tactics in Negotiations between States and Extremists: The Role of Cease-Fires and Counterterrorist Measures*, in ENGAGING EXTREMISTS: TRADE-OFFS, TIMING, AND DIPLOMACY, 221, 236-39 (I. William Zartman & Guy Olivier Faure eds., 2011).

**Table 5. Violent Behavior of the  
Fatah Revolutionary Council Based in Lebanon**

Year	Civilian	Security
1980	0	0
1981	0	0
1982	1	0
1983	0	0
1984	1	0
1985	1	0
1986	1	0
1987	1	0
1988	1	1
1989	1	1
1990	0	1
1991	1	1
1992	0	1
1993	0	1
1994	0	0
1995	0	0
1996	0	0
1997	0	0
1998	0	0
1999	0	0
2000	0	0
2001	0	0
2002	0	1
2003	0	0
2004	0	0

## II. STATE BEHAVIOR CAN CHANGE TOO

These case studies suggest that generalizing about an ethnic group is a mistake and a potentially serious one, and that we need to be open to the possibility of change even at the organizational level. The same is true for the behavior of the state toward an organization. Table 6 provides yearly observations of Israel's behavior toward Fatah in the West Bank and Gaza and Fatah's behavior in the West Bank and Gaza as it relates to attacks against civilians and security forces from the beginning of the Oslo process in 1993 to 2004. This table illustrates how state and organizational behavior can change and strongly suggests the possibility of a delayed feedback between the behavior of one actor and the behavior of the other actor.

**Table 6. Select Years for Israel and Fatah  
Negotiation and Violence  
from the Beginning of the Oslo Process until 2004**

Year	Negotiation Between Fatah and Israel	Israel's Attacks on Fatah	Fatah Attacks on Civilians	Fatah Attacks on Security Forces
1993	some concessions	yes	yes	yes
1994	some concessions	yes	yes	yes
1995	some concessions	yes	yes	yes
1996	negotiation	no	no	yes
1997	some concessions	no	no	no
1998	some concessions	no	no	yes
1999	some concessions	no	no	no
2000	negotiation	yes	yes	yes
2001	negotiation	yes	yes	yes
2002	no negotiation	yes	yes	yes
2003	negotiation	yes	yes	yes
2004	no negotiation	yes	yes	yes

Organizations clearly choose from a menu of various strategies but they rarely choose or commit to one strategy alone. Many organizations in the Middle East will often switch between violent and nonviolent contentious strategies as well as traditional

political activity. Moreover, the choice of strategies can be impacted by the type of regime and the behavior of the government as well as by the ideologies of the organizations themselves.

### III. GENERALIZATION LEADS TO BAD POLICY—AND ORGANIZATIONAL DATA CAN HELP GROUND ANALYSIS

Policymakers need to realize that the structure of the government and the way governments treat organizations and the populations they claim to represent will often have a direct impact on how those organizations behave. This brief overview examining examples of Middle Eastern ethnopolitical organizations is of equal importance, as it highlights the importance of disaggregating the behavior of organizations from the groups they claim to represent and the importance of not assuming that what is now true in terms of an organization's behavior was always true—or always will be. The MAROB data allows us to underline the importance of specificity in policy making and the need to check general assumptions. It also facilitates analysis that can allow policymakers to get a handle on the various factors that will impact outcomes not just based on one case or anecdotal evidence, but on data that can be used to accept or reject our own assumptions.<sup>14</sup>

### CONCLUSION

Ethnopolitical organizational behavior in the Middle East is complex, and our ability to understand such behavior and identify the right policy choices is often ill-served by generalizations expounded by scholars and journalists. Often multiple organizations claim to represent the same ethnic group, and while some will engage in violence and even terrorism to achieve their goals, others will persist in more traditional avenues for addressing grievances such as electoral politics (and arguably, this is something to be encouraged). Furthermore, organizations will change their tactics over time, or

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<sup>14</sup> See generally, e.g., Victor Asal, Richard Legault, Ora Szekeley & Jonathan Wilkenfeld, *Gender Ideologies and Forms of Contentious Mobilization in Middle East*, J. PEACE RES. (forthcoming 2013); Victor Asal, Mitchell Brown & Angela Dalton, *Why Split? Organizational Splits among Ethnopolitical Organizations in the Middle East*, 56 J. CONFLICT RESOL. 94 (2012).

adopt more than one tactic at the same time. While ethnopolitical violence is a continuing problem as the headlines from Iraq, Israel and various other countries in the Middle East illustrate all too often, our ability to understand and address these problems are hampered by over aggregation and simplification. The international community's ability to better understand ongoing conflicts and the potential avenues for solutions would be best served by taking a more nuanced and rigorous approach to collecting and analyzing data at the organizational level where important distinctions between organizations can be identified and key shifts in tactics can be followed and thus encouraged or discouraged.



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## MEDIATION—ITS POTENTIAL AND ITS LIMITS: DEVELOPING AN EFFECTIVE DISCOURSE ON THE RESEARCH AND PRACTICE OF PEACEMAKING

*Dennis C. Jett\**

The articles in this issue of the [\*Penn State Journal of Law & International Affairs\*](#) summarize analytic research relevant to conflict situations and offer recommendations for how conflicts can more effectively be brought to an end. It is therefore worth considering how policymakers might employ these recommendations as they pursue the often elusive goal of peace.

### THE “POLICYMAKER” DEFINED

One difficulty with that task is that “policymaker” is a title that can be applied to many different people playing many different roles in a conflict situation. The policymakers within a national government will be comprised of politicians elected to office, officials appointed by those politicians, and career bureaucrats. Each of them will approach the problem with different perspectives and priorities though they are nominally on the same team.

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Policymakers can come from the governments that are party to the conflict, neighboring states, regional and global powers, and any other nation that believes it has a dog in a particular fight.

In a civil war, in addition to the policymakers of the regime in power, there are those who have some degree of control over the group or groups trying to overthrow that regime in order to take power themselves. In any country in conflict, there are also the noncombatants who make up the elements of civil society that are trying to bring it to an end. They may not make policy, but the decisions they do make can place pressure on the combatants and help the cause of peace.

And then there are international organizations, where the representatives of member states provide instructions to international civil servants on how those organizations are to be involved. Even with clear guidance, there is much policy to be made in implementing a mandate including how to interpret it in the field and how forcefully to pursue it. Whether any of that can be done competently with the resources made available to these organizations by their members is another question.

That does not exhaust the list of players of course. Nongovernmental organizations are often instrumental in peace accords, once they are reached, as they can have the capacity to implement programs that bring into being many of the elements of such accords.

When the official representatives of the governments and rebel groups that are parties to the conflict fail to end it, a potential role for a mediator is created. Representatives of many of the organizations can attempt to serve in that capacity along with virtually anyone else who wants to engage in what is known as Track II diplomacy.<sup>1</sup> The only real requirement is that the parties to the conflict accept them as mediators. There is usually no shortage of elder statesmen and retired politicians willing to serve as mediators,

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<sup>1</sup> A discussion of Track II diplomacy and its use in the case of U.S.-Iranian relations can be found at: <http://iranprimer.usip.org/resource/track-ii-diplomacy>.

especially if visions of a Nobel Peace Prize nomination are dancing in their heads.

Even though all will agree that peace is the goal, each policymaker will approach it from his or her perspective and be encumbered by some limitations, which affect just how much policy they are willing and able to make. With so many potential players, and so many violent conflicts, it is therefore important to consider to whom the policy recommendations are being made and what constraints they may be operating under. It is with that preliminary consideration in mind that I offer an evaluation as to whether the recommendations contained in this journal issue are realistic and useful.

#### MEDIATION RESEARCH IN PRACTICE

- A. Scott Sigmund Gartner, [\*Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds\*](#)<sup>2</sup>

Improving mediation is important, but even the best mediation is not a silver bullet solution. Wars can end in one of four ways—through a military victory, when a halt to the fighting is imposed by outside powers, when the parties to the conflict negotiate a cessation of hostilities in good faith, and when they negotiate one in bad faith.

When one side wins outright, there is no need for mediation. A clear military victory is difficult in a civil war, however, as it usually pits a government with a weak army against rebel forces that are even weaker. Both sides will have the power to terrorize civilians, but rarely enough to defeat each other.

When the international community steps in and forces an end to the conflict, it does not remove the underlying reasons for why the war started in the first place. That can imply a long-term commitment to creating a solution and that, plus a general reluctance to use force

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<sup>2</sup> Scott Sigmund Gartner, [\*Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds\*](#), 2 PENN ST. J.L. & INT'L AFF. 27 (2013).

to end the use of force, means there is rarely any enthusiasm for that outcome among other countries.

A negotiated end to conflict can often involve and be facilitated by mediation. But as Scott Sigmund Gartner points out in his article, success is not as elusive as it seems because the conflicts in which mediators are involved are also the ones least likely to succeed. If a peace accord were easy, the parties could reach it themselves. This point is worth remembering, and the international community and potential mediators should not avoid making the effort simply because the chances for success are not good. While mediation can be costly in many ways, they pale in comparison to the likely costs of continued war. The parties to the conflict will measure the cost of mediation as the potential it has for diminishing their chances to obtain more power, often without much regard for the toll on noncombatants should the war continue. Human suffering aside, the costs of relief efforts for refugees and people displaced by the fighting can easily and quickly amount to hundreds of millions of dollars.

The need for local expertise is one of the reasons that regional governmental organizations, with close ties, in-depth knowledge, and shared regional identities, are becoming increasingly utilized as mediators.<sup>3</sup> On the other hand, while the countries in the region are the ones most directly affected by the spillover when a conflict's impact starts to cross borders, they may not be the best choice.

Regional organizations are often given the task of dealing with a conflict because the wider international community wants to avoid getting further involved rather than because they make ideal mediators. There is a strong correlation between conflict and poverty; civil wars occur more frequently in the least developed countries. The neighbors of countries in conflict are also likely to be poor and therefore the least able to support the cost of mediation and intervention. The neighboring states may also profit from the chaos by exploiting the resources of the country at war. And they will likely have an opinion as to which side they would like to see win. This may

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<sup>3</sup> *Id.*

be due to ethnic linkages, which can serve to make the conflict more difficult to resolve. So the decision to rely on a regional organization should be considered carefully and not assumed to be the best outcome.

B. Kyle Beardsley, [\*Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution\*](#)<sup>4</sup>

Kyle Beardsley's discussion of the use of leverage by mediators in attempting to end conflicts is a useful reminder that mediators can try to use too much leverage as well as too little leverage. Using too little will not resolve the conflict and using too much might only result in a short-term cessation of hostilities and not address the root causes of the conflict.

By using just the right amount of leverage, the mediator can in theory achieve an end to the bloodshed and the humanitarian disaster it has caused and, at the same time, set the stage for a lasting peace. That is easier said than done, however, and it seems to assume mediators have a range of tools to use and the ability and willingness to use them. That is rarely the case.

Mediators are almost always in an inherently weak position.<sup>5</sup> Their role has to be accepted by the parties to the conflict and those parties do not see such efforts as an opportunity to negotiate their own demise. They will limit what the mediator can accomplish and choose a mediator precisely because that person is weak. They are generally unwilling to concede much power to the mediator and will resist any efforts to force them to do things that they calculate are not in their interests. Thus, it is hard to identify too much or too little leverage *ex ante facto*, before its use, although the appropriate degree of leverage might be more clear *ex post facto*, after the mediation.

A mediator can have significant leverage if there is a willingness on the part of the international community to use military force or economic pressure to end a particular conflict. In his choice

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<sup>4</sup> Kyle Beardsley, [\*Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution\*](#), 2 PENN ST. J.L. & INT'L AFF. 57 (2013).

<sup>5</sup> See generally *id.*

of examples, Beardsley mentions the recent case of Syria where, as he notes, Russia and China have blocked any U.N. Security Council resolutions that might have teeth. Given the absence of any real leverage, Kofi Annan's efforts at mediation were doomed from the start. Since the Assad regime was not about to negotiate its own removal from power and is indifferent to the number of civilians killed, the only tool in Annan's toolbox was his ability to persuade both sides to stop fighting, and that obviously proved insufficient.

Beardsley uses the case of Rwanda as one where mediators used too much leverage. He believes this only resulted in a short-term cessation of hostilities, which was then followed by genocide after they resumed. A lower level of leverage implies less international involvement. It seems unlikely that would have made the outcome better and resulted in fewer deaths. In retrospect, most have concluded that a much more forceful intervention by the international community was required instead of an attempt at mediation that was too weak to prevent mass murder.

The problem for any mediator, and the international community as a whole, is that it is never clear whether hostilities are going to get worse or better. Even when there is some indication which direction the conflict is headed, unforeseen events—like the shooting down of the plane carrying Rwandan President Habyarimana and his Burundian counterpart—can be a catalyst for catastrophe. Habyarimana, had he lived, might have successfully implemented the Arusha accords.

The international reaction to conflict situations is often based on hope and the desire to avoid being drawn into the conflict. The biggest problem in Rwanda, as Beardsley points out, was the international community followed up the signing of the peace accords with a tiny peacekeeping force and a weak mandate that only allowed them to become bystanders, and at times victims, when the violence resumed.

The role of Richard Holbrooke in ending the war in Bosnia is cited by Beardsley as a compelling case in which the use of leverage calmed a humanitarian disaster. Holbrooke had a very forceful personality, however, and the military might of NATO to draw upon

if he chose to use it. There is no greater source of leverage than the ability to use force to punish an uncooperative party.

Having that power at the ready is not going to typically be the case. The international community is rarely willing to use such force. The fighting in Libya ended because the international community was willing to use such force in that instance. The fighting in Syria continues, however, because the international community is not willing to use force, at least not as of the time this is being written.

Another problem is that some mediators are life-long U.N. bureaucrats. One of the unwritten rules for a successful career at the U.N. seems to be “never alienate anyone.” With 193 member states as their bosses, those that work at the U.N. do not like to stick their necks out. A U.N. mediator therefore may not be enthusiastic about using leverage since it is bound to displease someone. Even mediators who are not U.N. officials are unlikely to have as strong a personality type as Holbrooke.

Beardsley’s fundamental point, however, is important for any mediator to consider. It is always essential to look into the toolbox and see what instruments of leverage it contains. Unfortunately, in many real world instances, there may not be much in the toolbox and the mediator may not be able or willing to use the tools available. Given Beardsley’s argument, additional research might examine how to expand the options available to mediators.

C. Molly M. Melin, [\*When States Mediate\*](#)<sup>6</sup>

In her essay on when states mediate, Molly Melin concludes that states should offer to mediate “only in optimal circumstances” and policymakers should “first consider the characteristics of the third party, the conflict, and the disputants.” Both recommendations may seem obvious but are they easily achieved?

States seek to act as mediators when their interests are at stake or when they feel they have to become involved. A

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<sup>6</sup> Molly M. Melin, [\*When States Mediate\*](#), 2 PENN ST. J.L. & INT’L AFF. 78 (2013).

humanitarian crisis can create pressure for international action as it did for Bosnia and Darfur even when the national interests of the major powers are not directly threatened. If the suffering largely escapes the media's attention and the public's concern, as it has in the Democratic Republic of the Congo, the pressure and the resulting action will be much less however.

Another reason states want to mediate is prestige. When a conflict is somehow identified with a potential mediator, because of colonial ties or other linkages, there will again be pressure, often from the public and the media, to play such a role. Having an interest in a conflict implies the mediator is not indifferent to the outcome, however, and that can lessen the acceptability of the mediator to the parties to the dispute. As Melin points out, in cases where the decision to attempt to mediate stems from domestic politics, public pressure, national interests, or politicians' search for prestige, the decision to get involved may have little to do with whether the situation is optimal for mediation.

If the conditions are not optimal, but the pressure to do something to end the conflict is significant, states will often look for non-state actors like international organizations or prominent former statesmen willing to play the role. That way any blame for failure, when it comes, can be shifted to the mediator and the damage to national pride and political risk can be minimized.

As Melin points out, nation states are the most frequent mediators of international disputes. Thus it is critical to understand the factors affecting their involvement. As she suggests, it is the parties involved in a conflict that decide whether there is to be a mediator and they will do that only when they think it serves their interests. The problem is that the disputants may not reach the stage until what I. William Zartman has characterized as a "hurting stalemate"<sup>7</sup> has been achieved. The combatants will then see further military efforts as impossible or unproductive. Arriving at that point may take years and is why there are more conflicts every year than

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<sup>7</sup> See I. William Zartman, *Conflict and Resolution: Contest, Cost, and Change*, 518 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 11, 16 (1991).



there are mediation efforts and not because states considering becoming mediators are pondering their strategic choices.

D. Stephen E. Gent, [\*The Politics of International Arbitration and Adjudication\*](#)<sup>8</sup>

Wars come in two flavors—the international kind where the opposing sides are nation states (interstate conflicts), and internal ones, where the regime in power is pitted against those who seek to overthrow it (intrastate conflicts). Wars between countries are usually over territory, though there are usually other factors involved as well. Wars within countries are almost always about political power. In the former, if the parties are willing to accept the outcome, those imaginary lines on maps called borders can easily be drawn to divide territory. Resolving the latter type of conflict is harder, however, because political power is not as easily divided, especially in a poor country where elites are either in power or out of luck. When a faction does take control of the government, even through legitimate elections, the majority tends to rule with little regard for the rights of minorities. And there is no Heritage Foundation or American Enterprise Institute where ideologues can hang out until their side can return to power.

The difference between interstate wars over territory and intrastate wars over political power also has implications for alternatives to mediation. As Gent points out in his essay, international arbitration and adjudication is often the most effective means of producing long-lasting settlements and certainly should be considered as an alternative means of dispute resolution.

Such a binding mechanism, however, is unlikely to be used when the challenge is dividing political power in a country where that has never been achieved before. Dividing territory is something international arbitrators are good at because there is usually some legal basis on which to proceed, but it does not always end the problem. Having an international body mandate a solution provides cover to political elites who have to defend against charges that they

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<sup>8</sup> Stephen E. Gent, [\*The Politics of International Arbitration and Adjudication\*](#), 2 PENN ST. J.L. & INT'L AFF. 66 (2013).

have given up too much. Even that may not be enough to ease the pain of wounded national pride, as Gent demonstrates in his description of how Ethiopia rejected an international boundary commission's demarcation of its frontier with Eritrea.

Gent also points out that the losing side in the finding of an arbitration panel is more likely to reject the decision if it possesses a clear power advantage. That means either other, more flexible mechanisms should be considered as he suggests, or at a minimum, the international community needs to throw its weight behind supporting the outcome and provide incentives for both sides to respect it. One advantage of having elections as part of the process that brings a civil war to end is that it confers legitimacy on the winner. The loser will have an easy excuse for rejecting the result if the winner is chosen by an international arbitrator and not by the voters. To avoid that tendency, the international community must use the carrots and sticks at its disposal to ensure the outcome is accepted if the parties agree to arbitration.

Interestingly, international arbitration has increasingly become the rule in international commercial disputes. While its use is growing in non-commercial international disputes, it is still not common. So while policymakers should certainly look carefully at all aspects of the conflict—including who should mediate and when—decisions are often made not on the basis of an objective and detached assessment of what can be achieved. Rather decisions are made on the basis of what is necessary and what is possible given the political pressures they are operating under. In order for international arbitration to expand from economic to political disputes actors will have to address these types of political pressures.

E. Isak Svensson, [\*Research on Bias in Mediation: Policy Implications\*](#)<sup>9</sup>

Isak Svensson discusses the policy implications of bias in mediators and concludes that even biased ones can play a useful role. He notes that rebel-biased mediators tend to create peace settlements that include power-sharing arrangements while government-biased

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<sup>9</sup> Isak Svensson, [\*Research on Bias in Mediation: Policy Implications\*](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

mediators opt for amnesties. Both the mediators and the outcomes that are deemed acceptable are up to the parties in the conflict. The bias in play may therefore result from the selection process rather than a preference toward a particular solution on the part of the mediator. Mediators “create” only those solutions that the combatants will agree to and are able to consider solutions that might be accepted by both sides.

Svensson’s central premise—that bias is not an inherent disqualifying feature of mediation—is an important one. However, and as Svensson points out, a little bias may not be a bad thing. The real test is whether the mediator is capable of guiding the parties to an agreement and not whether he or she is absolutely neutral. This also represents a major distinction between domestic mediation—which seeks neutrality among mediators—and international mediation. For example, it not only took Begin and Sadat to create peace between Israel and Egypt but it also took Carter, the leader of a pro-Israel state, to convince Israel to give up territory in exchange for a U.S. assurance of security. Mediators will often be charged with bias, especially by the side playing the weaker hand, whether it exists or not. The parties to the conflict have to have some sense that the mediator will act fairly even if not necessarily impartially. The bias may even help get the stronger side to a deal as it probably did at Camp David.

F. Birger Heldt, [\*The Lack of Coordination in Diplomatic Peacemaking\*](#)<sup>10</sup>

Birger Heldt, of the Folke Bernadotte Academy, examines the growth in the number of efforts at peacemaking in emerging conflicts and in particular the lack of coordination that results from so many different actors becoming involved. To address this problem, he suggests policymakers adopt a long-term strategy focused on coordination. In addition, he urges policymakers not to be discouraged by the failures of initial peacemaking attempts. He cautions that the need for coordination should not crowd out attempts at further peacemaking. He also emphasizes that if violence

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<sup>10</sup> Birger Heldt, [\*The Lack of Coordination in Diplomatic Peacemaking\*](#), 2 PENN ST. J.L. & INT’L AFF. 9 (2013).

is going to escalate dramatically, it normally does so in the first two years of the conflict.

That two-year window when effective peacemaking has a chance to prevent a significant expansion of hostilities is critical for policymakers to acknowledge and incorporate into planning efforts. The problem, of course, is that senior officials in any busy capitol or international body are almost always consumed by the crisis of the moment and long-term planning rarely gets beyond next week. The paradox and the tragedy is that until the violence does escalate, the conflict is likely to fail to grab the attention of the media and the policymakers.

The International Crisis Group and other organizations have long tried to direct the attention of officials to crises in need of attention and alert policymakers before the conflicts escalate. The U.N. has discussed ways to improve crisis management and to take advantage of constantly evolving information and communications technology.<sup>11</sup> It would be useful if each government and international organization had an internal group that was designed to prioritize mediation needs. And those groups should try and stay ahead of the curve by engaging in a continuing dialogue with those who make the study of mediation efforts their academic specialty.

The coordination of peacemaking efforts is made difficult by the fact that there are no barriers to entry, especially to potential Track II mediators. That may account for the growth in such efforts as much as any other factor. It is still worthwhile to attempt to bring coordination, as well as long-term planning, to peacemaking. The biggest obstacle is perhaps a lack of time and attention to the problem by policymakers as much as anything else. Heldt's policy recommendations offer an important reminder of the value of preventative measures and of the critical timeframe for such action.

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<sup>11</sup> See generally Daniel Stauffacher, *Strengthening Crisis Information Management*, 48 UN CHRONICLE (2011), <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2011/thedigitaldividend/strengtheningcrisisinformationmanagement>.

G. Victor Asal & Jonathan Wilkenfeld, [\*Ethnic Conflict: An Organizational Perspective\*](#)<sup>12</sup>

Victor Asal and Jonathan Wilkenfeld provide a convincing argument that assumptions about a conflict always need to be checked and that generalizations expounded by scholars and journalists can lead to the wrong policy choices. True experts in a region need to convey the complexity of each situation to policymakers without making it seem so difficult that any involvement is unwise. Academics and other analysts need to keep in mind that no data set can substitute for in-depth knowledge when it comes to a particular conflict. Some humility is required in making assessments of conflicts and policy recommendations regarding them. If they are made simply on the basis of number crunching of past conflicts, ideology or a lack of knowledge about the motivations of the combatants, an illusion of understanding will be created and could lead to poor decisions.<sup>13</sup>

H. David E. Cunningham, [\*Who Should Be at the Table?: Veto Players and Peace Processes in Civil War\*](#)<sup>14</sup>

David Cunningham cautions that too many players can spoil the peace process and urges that those without a veto be excluded from it. It will not be only the mediator that decides who gets a seat at the table, but to the extent that this recommendation can be followed, it should be. While civil society may not participate in the actual negotiations, it would also be useful to think of ways to help them pressure the parties to come to an agreement. Leymah Gbowee, the Liberian activist who won the Nobel Peace Prize, is one example of how such pressure can be used to encourage politicians to negotiate seriously.

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<sup>12</sup> Victor Asal & Jonathan Wilkenfeld, [\*Ethnic Conflict: An Organizational Perspective\*](#), 2 PENN ST. J.L. & INT'L AFF. 91 (2013).

<sup>13</sup> Richard Synge's book "Mozambique" is a good example of bad analysis and the U.S. Institute of Peace should be embarrassed by its publication. See RICHARD SYNGE, MOZAMBIQUE: UN PEACEKEEPING IN ACTION, 1992-94 (1997).

<sup>14</sup> David E. Cunningham, [\*Who Should Be at the Table?: Veto Players and Peace Processes in Civil War\*](#), 2 PENN ST. J.L. & INT'L AFF. 38 (2013).

Cunningham notes the problem with a strategy of threatening to exclude the main combatants from the negotiations is not effective. If they are not included there are no benefits from peace, because peace won't be possible. The parties must always reach a decision that their interests are better served by peace than by continued war for any talks to begin. And there must be some common ground that is reachable, which it is not when the aims of those doing the fighting are diametrically opposed and nonnegotiable.

I. J. Michael Greig, [\*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation\*](#)<sup>15</sup>

J. Michael Greig is the co-author of one of the most comprehensive books on international mediation.<sup>16</sup> Here, Greig applies his strong analytical understanding of mediation not to one issue, but to one case. In his assessment of Syria, he quotes one Middle Eastern analyst as saying that President Assad will go down fighting. If that is the case, there is little that can be done by the international community. If active military engagement is ruled out, the international community can do little more than encourage opposition forces to discuss and coordinate what will happen after the fighting stops. Efforts have been made and conferences held to try to avoid the post-conflict chaos that has been seen in Libya. It is unfortunate that more was not done to help Libya make the difficult transition from dictatorship to democracy, but it is hard to anticipate if and when regime change is going to succeed and therefore hard for the international community to know what to do and the best timing for doing it. And if, as in the case of Syria, those in power have strong allies like Russia and Iran encouraging them to fight on, a mediator will have little chance of success as Kofi Annan finally admitted. Whether his successor, Lakhdar Brahimi, will do any better will depend on circumstances beyond his control more than his ability to mediate.

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<sup>15</sup> J. Michael Greig, [\*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation\*](#), 2 PENN ST. J.L. & INT'L AFF. 48 (2013).

<sup>16</sup> J. MICHAEL GREIG & PAUL DIEHL, INTERNATIONAL MEDIATION (2012).

## CONCLUSIONS - MEDIATORS AND THE REALITIES THEY FACE

Mediators almost always play a weak hand unless, like Richard Holbrooke in the case of Bosnia, they represent an entity that is willing to take an active part in the conflict. Whether dealt a weak hand or a strong one, mediators play a crucial role in reaching a peaceful resolution to a conflict and have a significant effect on the durability of the settlement that ends the fighting. Mediators do not simply add “grease” to the “squeaky wheel” but can redefine issues, reshape debates, and restructure negotiations in ways that lead to successful and peaceful outcomes. It is therefore important that mediators carry out their responsibilities with the utmost skill and access to the relevant research, as that will enhance the chances for success.

At the same time, mediation often occurs in a crises situation where it is virtually impossible to reach out and learn about past patterns, new theories and innovative approaches. In that regard it is useful for policymakers, to draw on the cumulative knowledge of mediation scholars, both represented here and throughout the research community before they get to the work of mediating. Even if such general learning is not possible, whatever their relationship to the situation and their power to affect it, mediators and policymakers should consider the research-based recommendations outlined in this collection of essays.

The journal’s goal in constructing this issue—to develop a more robust and interactive dialogue between researchers and practitioners—should be received as a call to the members of both communities. It is important for researchers, who have the time to study these matters in depth without being forced to rapidly turn their attention to the next crisis, to share their findings on what works and what does not with more than other academics. And those who have served as mediators need to share with researchers their views on the constraints they face in the field. There are a number of ways to accomplish this kind of direct dialogue on peacemaking, which will draw the communities together and produce mutually beneficial results—and this issue serves as an important launch point to begin that discussion.

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## **WE CAN WORK IT OUT: PUTTING OUR BEST FOOT FORWARD IN INTERNATIONAL HIGHER EDUCATION INITIATIVES**

*Julie Rowland\**

### INTRODUCTION

Student movement across national borders is increasing rapidly as a result of globalization, marketplace competition, and programs aimed at student mobility.<sup>1</sup> International higher education can be described as “the conscious effort to integrate and infuse international, intercultural, and global dimensions into the ethos and outcomes of postsecondary education.”<sup>2</sup> For the U.S., this broad description encompasses a variety of actors and programs: American students and professors at universities abroad, foreign students and professors at American universities, American universities’ branch campuses abroad, efforts to incorporate cosmopolitan and global

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<sup>1</sup> *About Project Atlas*, PROJECT ATLAS, <http://www.iie.org/Research-and-Publications/Project-Atlas/About> (last visited Mar. 28, 2013).

<sup>2</sup> *About NAFSA*, NAFSA, <http://nafsa.org/about/default.aspx?id=23912> (last visited Mar. 28, 2013).



dimensions into university curriculum, joint curriculum and degrees between universities, and more.<sup>3</sup>

Most scholars agree that two significant historical events in world history, World War II and the Cold War, contributed significantly to American policymakers' interest in issues of international education.<sup>4</sup> American interest in international and comparative education can be viewed as a corollary to the more pressing concern of U.S. competitiveness in the global marketplace.<sup>5</sup> In particular, "Sputnik Shock" ignited concern for the quality and competitiveness of the American education system mid-century.<sup>6</sup> The 1983 publication of *A Nation at Risk*,<sup>7</sup> an extremely influential report detailing the failure of American schools to produce globally competitive students, further compounded public awareness of competition from abroad.<sup>8</sup> The report declared that America's failing education system was "eroding the economy,"<sup>9</sup> creating a perceived

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<sup>3</sup> Brian J. Garavalia, *International Education: How It Is Defined by U.S. Students and Foreign Students*, 70 CLEARING HOUSE 215, 217-18 (1997); Anneke Luijten-Lub et al., *On Cooperation and Competition: A Comparative Analysis of National Policies for Internationalisation of Higher Education in Seven Western European Countries*, 9 J. STUD. IN INT'L EDUC. 147, 153, 157 (2005).

<sup>4</sup> HANS DEWIT, INTERNATIONALIZATION OF HIGHER EDUCATION IN THE UNITED STATES OF AMERICA AND EUROPE: A HISTORICAL, COMPARATIVE, AND CONCEPTUAL ANALYSIS 19 (Philip G. Altbach, ed., 2002).

<sup>5</sup> FRANK NEWMAN, HIGHER EDUCATION AND THE AMERICAN RESURGENCE: A CARNEGIE FOUNDATION SPECIAL REPORT 13-15 (1985).

<sup>6</sup> Michael Dobbins & Kerstin Martens, *A Contrasting Case—The U.S.A. and Its Weak Response to Internationalization Processes in Education Policy*, in TRANSFORMATION OF EDUCATION POLICY 179, 182 (Kerstin Martens et al. eds., 2010) (defining "Sputnik Shock" as occurring when "the Soviet Union launched the first satellite in 1957," which demonstrated to American policymakers "the Soviet Union's technological superiority or at least its equality with the U.S.A. in this area").

<sup>7</sup> NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), [http://datacenter.spps.org/uploads/SOTW\\_A\\_Nation\\_at\\_Risk\\_1983.pdf](http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf).

<sup>8</sup> DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM 13-14 (1995); *but see* MICHAEL B. KATZ, RECONSTRUCTING AMERICAN EDUCATION 130 (1987) (explaining the controversial nature of *A Nation at Risk*).

<sup>9</sup> TYACK & CUBAN, *supra* note 8, at 34.

crisis in American education.<sup>10</sup> In light of growing global competition, policymakers viewed the education crisis as a “national security risk.”<sup>11</sup> Education in the U.S. is largely a state issue, but a national security risk required a federal government response. Faced with opposition from state policymakers, the Reagan administration made a strategic decision to elevate the crisis to an international level.<sup>12</sup> The administration pushed the Organization for Economic Cooperation and Development (OECD) to compile comparative statistical data on student achievement,<sup>13</sup> allowing the U.S. to focus education policy decisions on competition with other nations. This event marked the beginning of the education system’s use as an important tool for maintaining America’s global competitive edge. Today, the Obama administration’s education policy programs continue to reflect an awareness of international competition, especially competition as demonstrated by international test scores.<sup>14</sup>

The U.S.’s uncertain position in the global education competition has led to reform movements in compulsory education, such as the No Child Left Behind Act.<sup>15</sup> Over the past several decades, the comparative data generated through the OECD’s Programme for International Student Assessment (PISA)<sup>16</sup> has pushed other nations to make significant improvements in their

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<sup>10</sup> *Id.* at 78.

<sup>11</sup> Kerstin Martens & Stephan Leibfried, *The PISA Story: How Educational Policy Went International: A Lesson in Politics Beyond the Nation-state*, ATLANTIC TIMES (GER.) Jan. 2008, [http://www.atlantic-times.com/archive\\_detail.php?recordID=1132](http://www.atlantic-times.com/archive_detail.php?recordID=1132).

<sup>12</sup> *Id.*

<sup>13</sup> Martens & Leibfried, *supra* note 11.

<sup>14</sup> Tonia Bieber & Kerstin Martens, *The OECD PISA Study as a Soft Power in Education? Lessons from Switzerland and the US*, 46 EUR. J. EDUC. 102, 109-10 (2011); *but see* TYACK & CUBAN, *supra* note 8, at 34-37 (exploring the controversy around sources of comparative education data).

<sup>15</sup> *Id.* at 109.

<sup>16</sup> OECD Programme for International Student Assessment, AUSTL. COUNCIL FOR EDUC. RESEARCH (2012), <http://www.acer.edu.au/ozpisa/assessment/> (“PISA assesses the extent to which students near the end of compulsory education have acquired some of the knowledge and skills that are essential for full participation in society. In all cycles, the domains of reading, mathematical and scientific literacy are covered not only in terms of mastery of the school curriculum, but in terms of important knowledge and skills needed in adult life.”).

education systems to remain globally competitive.<sup>17</sup> In the realm of higher education, the U.S. has consistently been a leader in attracting foreign talent.<sup>18</sup> Since 9/11,<sup>19</sup> however, the international dimension of U.S. higher education has contracted.<sup>20</sup> At the same time, many other nations have rapidly expanded the international dimension of their higher education through participation in international initiatives.<sup>21</sup> These initiatives seek to increase student mobility by harmonizing higher education systems.<sup>22</sup>

To demonstrate how the U.S. can become more involved in international higher education initiatives, this comment will first give an overview of the history of these initiatives globally.<sup>23</sup> Section III will explore the legal and soft governance mechanisms involved and their feasibility of application to the U.S.<sup>24</sup> A description of the structures of these initiatives and the difficulties associated with each will follow, aiding in the understanding of how the U.S. can fit into the international picture.<sup>25</sup> Section IV will examine examples of harmonization in the U.S. to demonstrate the feasibility of U.S. participation in international initiatives.<sup>26</sup> This comment will conclude by considering possible courses of action for U.S. in this area.<sup>27</sup>

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<sup>17</sup> Bieber & Martens, *supra* note 14, at 108.

<sup>18</sup> ACE CTR. FOR INT'L INITIATIVES, AM. COUNCIL ON EDUC., STUDENTS ON THE MOVE: THE FUTURE OF INTERNATIONAL STUDENTS IN THE UNITED STATES (Oct. 2006) <http://www.acenet.edu/news-room/Documents/IssueBrief-2006-Students-on-the-Move-The-Future-of-International-Students-in-the-United-States.pdf>.

<sup>19</sup> Rodolfo Altamirano, *Viewpoint: The Impact of 9/11 on International Education*, MICH. DAILY, Sept. 8, 2004, <http://www.michigandaily.com/content/viewpoint-impact-911-international-education> (explaining how the Student and Exchange Visitor Information System database, additional border security, and the difficulty of obtaining visas impact international student mobility); *see also* David A. Urias & Card Camp Yeakey, *International Students and U.S. Border Security*, NEA HIGHER EDUC. J. 187, 187 (Fall 2005).

<sup>20</sup> Dobbins & Martens, *supra* note 6, at 189.

<sup>21</sup> *Id.* at 188-89.

<sup>22</sup> *See infra* Section II.

<sup>23</sup> *See infra* Section II.

<sup>24</sup> *See infra* Section III.

<sup>25</sup> *See infra* Sections IIIB - D.

<sup>26</sup> *See infra* Section IV.

<sup>27</sup> *See infra* Section V.

American education policy remains largely decentralized and focused on local control.<sup>28</sup> Politicians consistently address global education competitiveness, but the U.S. has yet to respond significantly to international initiatives.<sup>29</sup> This is in part because the U.S.'s decentralized education system makes policy-making on a national level challenging.<sup>30</sup> While individual higher education institutions can and do participate in international mobility efforts by accepting and sending students across borders, a unified and consistent policy does not currently exist in the U.S.<sup>31</sup>

Participation in international initiatives to increase student mobility is said to have a significant impact on the competitive edge of nations.<sup>32</sup> These mobility enhancing initiatives can increase economic cooperation, the prestige of a nation's institutions, goodwill between nations, and the quantity and quality of data available to comparative education researchers.<sup>33</sup> However, international initiatives in education would likely require cooperation on all governance levels—state, federal, and international. Initiatives by international organizations such as the European Union (E.U.) affect not only national governments, but also regional or state entities and individual higher education institutions.<sup>34</sup> Individual

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<sup>28</sup> U.S. DEP'T OF EDUC., EDUCATION IN THE UNITED STATES: A BRIEF OVERVIEW 6 (2005), <http://www2.ed.gov/about/offices/list/ous/international/edu/index.html>; Dobbins & Martens, *supra* note 6, at 180.

<sup>29</sup> Dobbins & Martens, *supra* note 6, at 180.

<sup>30</sup> *Id.*

<sup>31</sup> HUM. RES. DEV. WORKING GRP., CTR. FOR THE STUDY OF HIGHER EDUC. AT THE UNIV. OF MELBOURNE, HIGHER EDUCATION DIPLOMA SUPPLEMENTS AMONG APEC MEMBER ECONOMIES 7 (2010) [hereinafter APEC DIPLOMA SUPPLEMENT REPORT], [http://hrd.apec.org/images/c/cc/APEC\\_Higher\\_Education\\_Diploma\\_Supplement\\_-\\_Final\\_Report.pdf](http://hrd.apec.org/images/c/cc/APEC_Higher_Education_Diploma_Supplement_-_Final_Report.pdf).

<sup>32</sup> Luijten-Lub et al., *supra* note 3, at 150; Laurel S. Terry, *The Bologna Process and its Impact in Europe: Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 210 (2008) [hereinafter Terry 2008].

<sup>33</sup> MINISTERS ATTENDING THE ASIA-PACIFIC EDUC. MINISTERS' MEETING, THE BRISBANE COMMUNIQUE (2006), <http://shelbycearley.files.wordpress.com/2010/06/thebrisbanecommunique.pdf>; Alexander W. Wiseman & David P. Baker, *The Worldwide Explosion of Internationalized Education Policy*, in GLOBAL TRENDS IN EDUCATION POLICY 10-11 (Alexander W. Wiseman & David P. Baker, eds., 2005).

<sup>34</sup> APEC DIPLOMA SUPPLEMENT REPORT, *supra* note 31, at v-vi, 27.

higher education institutions, acting through unifying organizations such as the Council for Higher Education Accreditation (CHEA) or the Association of American Colleges and Universities (AACU), can affect the policies made by national and international actors.<sup>35</sup> Additionally, national policymakers may use international organizations' initiatives as way of legitimizing their own national goals or promoting particular approaches to international policy in general.<sup>36</sup> International higher education initiatives, in short, require significant coordination and transparency among a variety of entities with sometimes greatly differing motivations.<sup>37</sup>

The U.S. is capable of this level of cooperation and coordination internationally.<sup>38</sup> Current domestic programs demonstrate this capability by slowly harmonizing the qualification frameworks of higher education among states.<sup>39</sup> For the purposes of this comment, qualification frameworks refer to the systems that classify higher education by "level, workload, quality, profile and learning outcomes."<sup>40</sup> The common framework in the U.S., for example, allows students to transfer from one institution to another while retaining many of their credits because the institutions recognize curricular similarities and account for the differences.

In harmonizing qualification frameworks across nations, international initiatives seek to make key connections between frameworks so that qualifications are treated relatively equally in all

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<sup>35</sup> Barbara Brittingham, *Accreditation in the United States: How Did We Get to Where We Are?*, in NAT'L ADVISORY COMM. ON INST'L QUALITY & INTEGRITY, U.S. DEP'T OF EDUC., REPORT OF THE FEBRUARY 3-4, 2011 MEETING 14, 14 (Feb. 3, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2-11-presenters.html>.

<sup>36</sup> SACHA GARBEN, EU HIGHER EDUCATION LAW: THE BOLOGNA PROCESS AND HARMONIZATION BY STEALTH 213 (2011).

<sup>37</sup> *Id.* at 212.

<sup>38</sup> Wiseman & Baker, *supra* note 33, at 4 ("Being open to external forces, like common worldwide understanding about how sectors like education should work in all nations, makes national policymaking ripe for internationalizing.").

<sup>39</sup> See *infra* Section III.

<sup>40</sup> DANIELA ULICNA ET AL., EUR. COMM'N & AUSTL. DEP'T OF EDUC., STUDY ON THE (POTENTIAL) ROLE OF QUALIFICATIONS FRAMEWORKS IN SUPPORTING MOBILITY OF WORKERS AND LEARNERS 57 (Oct. 2011), [http://ec.europa.eu/education/more-information/doc/2011/australia\\_en.pdf](http://ec.europa.eu/education/more-information/doc/2011/australia_en.pdf).

nations.<sup>41</sup> The U.S. has slowly moved toward coordination with other nations by continuing international harmonization but thus far has refused to be bound by international initiatives.<sup>42</sup> Unlike the U.S., many of the member nations of the Asian-Pacific Economic Cooperation (APEC) and the E.U. have begun processes of international harmonization through their respective international organizations.<sup>43</sup>

In the U.S., higher education policy is moving toward a more internally centralized and harmonized system on several fronts.<sup>44</sup> While the U.S. has not yet engaged significantly with current international higher education initiatives, it has employed similar harmonization programs internally among states and across North American borders.<sup>45</sup> These programs have come both from grassroots organizations and agencies (the ground-up approach) and from the Department of Education and other national policy making entities (a top-down approach).<sup>46</sup> The U.S. has yet to take significant steps toward cooperation with international initiatives. As a global leader, it is time for the U.S. to seriously consider further international harmonization in the increasingly globalized world of higher education.

## I. OVERVIEW OF INTERNATIONAL HIGHER EDUCATION INITIATIVES

To create international higher education initiatives, member nations of international organizations may enter into formal agreements.<sup>47</sup> Many of these agreements are not legally binding in the

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<sup>41</sup> OLUSOLA OYEWOLE, HARMONISATION OF DEGREE STRUCTURES, AND REGIONAL QUALIFICATIONS FRAMEWORKS IN THE AFRICAN HIGHER EDUCATION SPACE 1 (2011).

<sup>42</sup> Laurel S. Terry, *International Initiatives that Facilitate Global Mobility in Higher Education*, 2011 MICH. ST. L. REV. 305, 329 (2011) [hereinafter Terry 2011].

<sup>43</sup> *Id.* at 318, 330.

<sup>44</sup> See *infra* Section III.

<sup>45</sup> DEWITT, *supra* note 4, at 30-31, 39; see also *Program for North American Mobility in Higher Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/fipsenortham/index.html> (last modified June 16, 2011).

<sup>46</sup> See *infra* Section III.

<sup>47</sup> GARBEN, *supra* note 36, at 5-7.

ordinary sense.<sup>48</sup> The purposes of these agreements are to coordinate institutions to facilitate increased student mobility and to encourage participation in international education projects and programs.<sup>49</sup> Initiatives include the European Community Action Scheme for the Mobility of University Students (ERASMUS), the European Credit and Transfer System (ECTS), the Bologna Process, and various efforts of APEC.<sup>50</sup> The U.S. has also been peripherally involved in international higher education initiatives and has strengthened its student mobility framework.<sup>51</sup> The selected initiatives below are a sampling of key programs and do not represent an exhaustive list of the programs around the world.

#### A. ERASMUS

The ERASMUS program, initiated in 1987 by the E.U.'s European Commission,<sup>52</sup> has been moderately successful at its goal of promoting student mobility across higher education institutions in Europe.<sup>53</sup> To participate in ERASMUS, institutions are required to have an ERASMUS University Charter.<sup>54</sup> This charter helps the institution coordinate with the European Commission by providing the basic framework, principles, and requirements for participation.<sup>55</sup> ERASMUS uses both centralized and decentralized efforts to coordinate institutions with the E.U.<sup>56</sup> After its establishment,

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<sup>48</sup> *Id.* at 174.

<sup>49</sup> *Id.*

<sup>50</sup> Terry 2011, *supra* note 42, at 305.

<sup>51</sup> DEWIT, *supra* note 4, at 30-31; *see also* U.S. Network for Education Information, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ous/international/usnei/edlite-index.html> (last modified Dec. 22, 2007).

<sup>52</sup> The European Commission is the European Union's executive body. *See About the European Commission*, EUR. COMM'N, [http://ec.europa.eu/about/index\\_en.htm](http://ec.europa.eu/about/index_en.htm) (last updated Nov. 16, 2012).

<sup>53</sup> Heather Field, *Higher Education in the Twenty-First Century: Integrating Tertiary Education in Europe*, 585 ANNALS 182, 187 (2003).

<sup>54</sup> *The ERASMUS Programme – Studying in Europe and More*, EUR. COMM'N, [http://ec.europa.eu/education/lifelong-learning-programme/doc80\\_en.htm](http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm) (last updated Jan. 9, 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (“[S]o called ‘decentralised actions’ that promote individual mobility are run by national agencies in the 33 participating countries and ‘centralised’ actions, such as networks, multilateral projects and the award of the ERASMUS



ERASMUS expanded to encompass countries outside Europe, including the U.S. via the Atlantis program.<sup>57</sup> Through competitive grants, the Atlantis program promotes mobility and a “transatlantic dimension” to higher education.<sup>58</sup> The Atlantis grant competition was cancelled for fiscal year 2011 due to Congressional budget reductions.<sup>59</sup>

#### B. The European Credit Transfer and Accumulation System (ECTS)

ECTS was created in response to the needs of newly mobile students in the ERASMUS program.<sup>60</sup> As a system promoting cross-institution degree and credit recognition, ECTS marks the first of several mechanisms developed to harmonize higher education institutions across Europe.<sup>61</sup> A recent report, Problems of Recognition in Making Erasmus (PRIME), showed that fifty-nine percent of European higher education institutions surveyed use ECTS as their only credit system, and thirty-seven percent use ECTS with a national credit system.<sup>62</sup> In addition to ECTS, the European

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University Charter, are managed by the EU’s Education, Audiovisual and Culture Executive Agency.”).

<sup>57</sup> Terry 2011, *supra* note 42, at 314.

<sup>58</sup> *European Union-United States Atlantis Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/fipseec/index.html> (last modified June 16, 2011).

<sup>59</sup> *Id.*

<sup>60</sup> Terry 2011, *supra* note 42, at 315 (explaining that “the needs of the ERASMUS programme led directly to the creation of another EU initiative that has been highly influential,” ECTS).

<sup>61</sup> EUR.COMM’N, ECTS USER’S GUIDE 7 (2009) [hereinafter ECTS USER’S GUIDE], [http://ec.europa.eu/education/lifelong-learning-policy/doc/ects/guide\\_en.pdf](http://ec.europa.eu/education/lifelong-learning-policy/doc/ects/guide_en.pdf) (describing ECTS as “a tool that helps to design, describe, and deliver programmes and award higher education qualifications. The use of ECTS, in conjunction with outcomes-based qualifications frameworks, makes programmes and qualifications more transparent and facilitates the recognition of qualifications. ECTS can be applied to all types of programmes, whatever their mode of delivery (school-based, work-based), the learners’ status (full-time, part-time) and to all kinds of learning (formal, non-formal and informal).”).

<sup>62</sup> EREN DICLE ET AL., PRIME REPORT 2010 16 (2010), [http://prime.esn.org/sites/prime.esn.org/files/PRIME20Report%202010\\_0.pdf](http://prime.esn.org/sites/prime.esn.org/files/PRIME20Report%202010_0.pdf) (“In order to facilitate recognition of degrees and study achievements; a clear system of accreditation, the European Credit Transfer and Accumulation System (ECTS) has been introduced to replace various local systems.”); *Key Results*, PRIME, <http://prime.esn.org/content/key-results> (last visited Jan. 30, 2012).



Commission, the Council of Europe and UNESCO collectively created the Diploma Supplement.<sup>63</sup> This supplement provides a “standardised[*sic*] description of the nature, level, context, content and status of the studies” completed by each graduate.<sup>64</sup> ERASMUS and ECTS are implemented through national agencies equivalent to the U.S. Department of Education.<sup>65</sup> ECTS exemplifies a classification framework implemented through an international initiative, ERASMUS.

### C. The Bologna Process

The Bologna Process was not initiated by a centralized authority like the European Union. Rather, through the Bologna Declaration of 1999, twenty-nine countries agreed to facilitate mobility for students, graduates, and higher education faculty.<sup>66</sup> Essentially, the process of the Bologna Agreement consists of creating the European Higher Education Area by “ironing out” national idiosyncrasies and slowly “Europeanizing” higher education.<sup>67</sup> Key areas of attempted harmonization are both substantive, as with the Europeanization of curriculum,<sup>68</sup> and procedural, as demonstrated by the creation of a framework for comparable or uniform credits and degrees.<sup>69</sup> The Bologna Process uses the ECTS framework as one mechanism of harmonization.<sup>70</sup>

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<sup>63</sup> Terry 2008, *supra* note 32, at 136.

<sup>64</sup> *The Diploma Supplement*, EUR. COMM’N, [http://ec.europa.eu/education/lifelong-learning-policy/doc1239\\_en.htm](http://ec.europa.eu/education/lifelong-learning-policy/doc1239_en.htm) (last updated Feb. 7, 2013).

<sup>65</sup> DICLE ET AL., *supra* note 62, at 23 (“The National Agencies (NAs) are the link between the European Commission and Higher Education Institutions.”).

<sup>66</sup> Field, *supra* note 53, at 183.

<sup>67</sup> *Id.*

<sup>68</sup> *See generally* EUR. COMM’N, EU RESEARCH ON SOCIAL SCIENCES AND HUMANITIES: HIGHER EDUCATION INSTITUTIONS’ RESPONSES TO EUROPEANISATION, INTERNATIONALISATION AND GLOBALISATION. DEVELOPING INTERNATIONAL ACTIVITIES IN A MULTI-LEVEL POLICY CONTEXT (June 2005).

<sup>69</sup> *Id.* at 184, 186.

<sup>70</sup> ECTS USER’S GUIDE, *supra* note 61, at 9.

The Bologna Process is entirely voluntary,<sup>71</sup> and participating countries include all E.U. member nations and twenty non-E.U. countries.<sup>72</sup> The U.S. is not presently a participant, though policymakers are closely monitoring its progress.<sup>73</sup> Scholars view the Bologna Process as a response to the view that European universities could not compete in a “global ‘knowledge-based economy’” because of “brain-drain, the poor international reputation of national universities, low graduate outputs and success rates, rising academic unemployment, [and] insufficient financial resources.”<sup>74</sup> This description could easily describe the motivation behind the initiatives of the E.U. and APEC as well.

#### D. APEC’s Efforts

APEC is an organization of twenty-one member economies including the U.S., Canada, Mexico, China, Singapore, Japan, Korea, and Russia.<sup>75</sup> According to the White House, the total U.S.-APEC trade has reached at least \$2.3 trillion in goods and services since APEC’s inception.<sup>76</sup> A 2010 study by the University of Melbourne explains that APEC member economies are increasingly incorporating their own Diploma Supplement into their higher education systems.<sup>77</sup> The structure and content of supplements in APEC economies are highly influenced by those of Europe, Australia, and New Zealand.<sup>78</sup> The study also reports “widespread support” for an APEC-developed Diploma Supplement.<sup>79</sup> Currently,

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<sup>71</sup> Eva M. Voegtler et al., *To What Extent Does Transnational Communication Drive Cross-national Policy Convergence? The impact of the Bologna-process on Domestic Higher Education Policies*, 61 HIGHER EDUC. 77, 78 (2010).

<sup>72</sup> Terry 2011, *supra* note 42, at 318.

<sup>73</sup> Terry 2008, *supra* note 32, at 111.

<sup>74</sup> Voegtler et al., *supra* note 71, at 77-78.

<sup>75</sup> *Member Economies*, ASIA-PACIFIC ECON. COOP., <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx> (last visited Mar. 28, 2013).

<sup>76</sup> Office of the Press Sec’y, *APEC: Fact Sheet on 19th Annual Leaders Meeting Outcomes Creating Jobs, Growth, and Economic Opportunity with AELM Declaration & Annexes*, WHITE HOUSE (Nov. 13, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/13/apec-fact-sheet-19th-annual-leaders-meeting-outcomes-creating-jobs-growth>.

<sup>77</sup> APEC DIPLOMA SUPPLEMENT REPORT, *supra* note 31, at 6-7.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

member economies may also use Memoranda of Understanding—government-to-government agreements—to assure that higher education meets mutual standards of quality.<sup>80</sup>

#### E. U.S. Movement

In 1995 the U.S., in collaboration with Canada and Mexico, created the Program for North American Mobility in Higher Education, a competitive grant program designed to encourage mobility and a “North American dimension” to higher education.<sup>81</sup> A byproduct of this program has been a movement toward development of mutual credit recognition and joint curricula and degrees across Mexico, the U.S., and Canada.<sup>82</sup> However, the grant competition was cancelled for fiscal year 2011 due to Congressional budget reductions.<sup>83</sup>

Nevertheless, there is evidence that the U.S. is engaging with the higher education initiatives of international organizations on its own terms. For example, the U.S. and Canada, two APEC member economies, signed the Council of Europe’s Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon Convention).<sup>84</sup> The Council of Europe is an organization of forty-seven countries that focuses on promoting human rights and the rule of law in Europe.<sup>85</sup> The Lisbon Convention promotes the use of the Council of Europe/UNESCO

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<sup>80</sup> *Id.*; AUSTL. UNIVS. QUALITY AGENCY, ENHANCEMENT OF QUALITY ASSURANCE SYSTEMS IN HIGHER EDUCATION IN APEC MEMBER ECONOMIES 37-38 (2006), <http://m.apec.org/Press/Features/2007/~media/Files/Press/Features/2007/2007Par0001Filev2.ashx>.

<sup>81</sup> *Program for North American Mobility in Higher Education*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/fipsenortham/index.html> (last modified June 16, 2011).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See Convention on the Recognition of Qualifications concerning Higher Education in the European Region*, CETS No.: 165, COUNCIL OF EUR. [hereinafter, *CETS No. 165*], <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=&DF=&CL=ENG> (last updated Nov. 18, 2012).

<sup>85</sup> *Who We Are*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&cl=en> (last visited Mar. 28, 2013).

Diploma Supplement.<sup>86</sup> Russia and Australia have signed and ratified the Lisbon Convention.<sup>87</sup> The U.S., as a non-member with observer status, signed without accession, i.e. agreeing to be legally bound.<sup>88</sup> In conjunction with signing the Lisbon Convention, the U.S. Department of Education initiated the U.S. Network for Education Information (USNEI) purportedly as a response to requests from within the federal government and from education associations.<sup>89</sup> The USNEI provides information for U.S. students or workers seeking education abroad and to foreign students or workers seeking U.S. education.<sup>90</sup>

## II. SOFT GOVERNANCE

### A. Definition

The international higher education initiatives discussed above are forms of soft governance. Soft governance is typical of international agreements because of the absence of a centralized authority.<sup>91</sup> The definition and significance of soft governance, and its accompanying term “soft law,” are debated and elusive. However, soft law can be identified by distinguishing it from hard law, or what is commonly thought of as binding law in domestic legal systems.<sup>92</sup> Soft law typically lacks some element of “obligation, precision, [or] delegation.”<sup>93</sup> A more flexible form of governance, soft law may more readily facilitate cooperation between distinct, autonomous entities, but it is criticized for the ambiguity it leaves in its wake.<sup>94</sup> Typical instruments of soft governance include: “norm setting, opinion formation, financial means, coordinative activities, [and]

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<sup>86</sup> *The Lisbon Recognition Convention*, COUNCIL OF EUR. [http://www.coe.int/t/dg4/highereducation/recognition/lrc\\_EN.asp](http://www.coe.int/t/dg4/highereducation/recognition/lrc_EN.asp) (last visited Mar. 28, 2013).

<sup>87</sup> APEC DIPLOMA SUPPLEMENT REPORT, *supra* note 31, at 7.

<sup>88</sup> *CETS No. 165*, *supra* note 84.

<sup>89</sup> *About USNEI*, ED.GOV, <http://www2.ed.gov/about/offices/list/ous/international/usnei/edlite-about.html> (last modified Feb. 11, 2008).

<sup>90</sup> *Id.*

<sup>91</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 423 (2000).

<sup>92</sup> *Id.* at 422-23.

<sup>93</sup> *Id.* at 422.

<sup>94</sup> *Id.*

consulting services.”<sup>95</sup> The international education initiatives described above typically consist of declarations of intended action, rather than treaties that can bind the signatory nations.<sup>96</sup>

#### B. Feasibility of an Initiative

If the U.S. seeks to participate in international higher education initiatives, it is necessary to examine the feasibility of soft governance in the U.S. context. In general, the degree to which a nation participates in a soft governance initiative can be examined using two different approaches: 1) the veto players in the state and national governments; and 2) the nation’s guiding principles.<sup>97</sup>

First, veto players include people or institutional components within a national government that have the ability to hinder the progress of an initiative.<sup>98</sup> Essentially, the greater the number of players who agree with or are somehow advantaged by the initiative’s policy, the greater the likelihood that the nation will successfully harmonize with the international initiative. In the U.S., potential veto players at the national level—Congress, the President, leaders in the Department of Education—must contend with potential veto players at the state and local level, both public and private, because of the decentralized nature of U.S. education.<sup>99</sup> Therefore, any discussion of the U.S.’s international dimension to higher education must always include an examination of the multiple players involved. This complexity may explain U.S. policymakers’ hesitance to address an American approach to international higher education. However, because of the decentralized nature of American education, a veto

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<sup>95</sup> Alexander-Kenneth Nagel et al., *Introduction—Education Policy in Transformation*, in *TRANSFORMATION OF EDUCATION POLICY* 3, 10-12 (Kerstin Martens et al. eds., 2010).

<sup>96</sup> GARBEN, *supra* note 36, at 90.

<sup>97</sup> Nagel et al., *supra* note 95, at 13-14.

<sup>98</sup> *Id.*

<sup>99</sup> PETER D. ECKEL & JACQUELINE E. KING, AN OVERVIEW OF HIGHER EDUCATION IN THE UNITED STATES: DIVERSITY, ACCESS, AND THE ROLE OF THE MARKETPLACE 3 (2004), <http://www.acenet.edu/news-room/Documents/Overview-of-Higher-Education-in-the-United-States-Diversity-Access-and-the-Role-of-the-Marketplace-2004.pdf>.

player in the U.S. is not likely to impede efforts to cooperate with international organizations.<sup>100</sup>

Instead, the U.S.'s guiding principles are likely to determine its willingness to engage in international higher education initiatives. Important guiding principles in the context of this discussion may include beliefs about the purposes, significance, and expected outcomes of higher education and international cooperation.<sup>101</sup> In the U.S., state and federal policymakers consistently link education with economic success on a personal and national level.<sup>102</sup> However, organizations like the Association of American Colleges and Universities (AACU) promote the ideals of a liberal education.<sup>103</sup> The AACU defines a liberal education as one in which "students develop a sense of social responsibility" and which promotes "broad learning in multiple disciplines and ways of knowing."<sup>104</sup> The philosophy of American education has historically alternated between an emphasis on liberal and vocational styles of education.<sup>105</sup>

International scholars have identified a positive correlation between the cultural, institutional, and socioeconomic similarities among nations and the similarity of policymakers' interpretation and

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<sup>100</sup> Nagel et al., *supra* note 95, at 265.

<sup>101</sup> *Id.* at 14-15.

<sup>102</sup> Matt Compton, *The Blueprint for an America Built to Last*, WHITE HOUSE (Jan. 24, 2012, 11:19 PM), <http://www.whitehouse.gov/blog/2012/01/24/blueprint-america-built-last> ("We need to promote new skills and better education so that all Americans are prepared to compete in a global economy."); *Regional Economic Development Councils*, N.Y. ST., <http://regionalcouncils.ny.gov/faq> (last visited Mar. 28, 2013) ("Public and private higher education institutions are essential components of the State's economic engine, serving as centers of innovation and research, teaching the business leaders of tomorrow, anchoring our communities, and creating jobs.").

<sup>103</sup> *Liberal Education*, ASS'N OF AM. COLLS. & UNIVS., <http://www.aacu.org/resources/liberaleducation/index.cfm> (last visited Mar. 28, 2013).

<sup>104</sup> *What is a 21<sup>st</sup> Century Liberal Education?*, ASS'N OF AM. COLLS. & UNIVS., [http://www.aacu.org/leap/what\\_is\\_liberal\\_education.cfm](http://www.aacu.org/leap/what_is_liberal_education.cfm) (last visited Mar. 28, 2013).

<sup>105</sup> See generally DIANE RAVITCH, *LEFT BACK: A CENTURY OF BATTLES OVER SCHOOL REFORM* (2000); KATZ, *supra* note 8; TYACK & CUBAN, *supra* note 8.

implementation of international policies.<sup>106</sup> In other words, similar participating nations are more likely to participate in an initiative in similar ways. Because cultural, institutional, and socioeconomic considerations shape how a nation addresses welfare issues such as education, these factors may dramatically influence how a nation filters the international initiative down through national, state or regional, and local government.

### C. Structuring an Initiative

International soft governance measures can be initiated by international organizations, such as the E.U.'s ERASMUS program, or they can be initiated outside of one formal body, such as the Bologna Process. The E.U.'s initiative can be characterized as a top-down effort to harmonize higher education institutions. The E.U.'s powers, called competences, are set forth in treaties such as the Treaty on the Functioning of the European Union (TFEU).<sup>107</sup> Member nations grant competences and give legitimacy to the E.U., and treaties take effect only with the consent of the signatory nations.<sup>108</sup> The E.U. holds only the power granted to it, explicitly or implicitly, and the remaining powers are retained by member nations.<sup>109</sup> The European Court of Justice (ECJ) has interpreted the E.U.'s competences broadly to include education as it relates to the internal market.<sup>110</sup> Additionally, Article 165 TFEU delineates the E.U.'s education competence.<sup>111</sup>

In addition to the flexible and ambiguous powers of international organizations in the E.U. and the national government in the U.S., education is also affected by the General Agreement on Trade in Services (GATS).<sup>112</sup> The U.S. and E.U., as well Japan, New

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<sup>106</sup> Torben Heinze & Christoph Knill, *Analysing Differential Impact of the Bologna Process: Theoretical Considerations on National Conditions for International Policy Convergence*, 56 HIGHER EDUC. 493, 495, 506 (2008).

<sup>107</sup> GARBEN, *supra* note 36, at 57-59.

<sup>108</sup> *Id.* at 58.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 100.

<sup>111</sup> *Id.* at 59.

<sup>112</sup> KEMAL GÜRÜZ, HIGHER EDUCATION AND INTERNATIONAL STUDENT MOBILITY IN THE GLOBAL KNOWLEDGE ECONOMY 189 (2011).

Zealand, and Australia, voluntarily participate in GATS to “expand the opportunities for global trade in services by removing barriers.”<sup>113</sup> GATS has raised controversy because it may supersede national and institutional authority, leaving academic autonomy vulnerable to future repercussions of the agreement.<sup>114</sup> Additionally, some higher education institutions balk at the valuation of higher education as good to be traded rather than a beneficial social service.<sup>115</sup> A tension exists between the economic and socio-cultural values of education.<sup>116</sup> While globalizing education advances a nation’s place in the knowledge economy, nations tend to protect national education strategies because of their socio-cultural value.<sup>117</sup>

In contrast to E.U. initiatives, the Bologna Process can be characterized as a ground-up initiative in the sense that no single international organization coordinates and guides the process.<sup>118</sup> The participating nations have proceeded in a purposefully ground-up manner to avoid granting control to any international organization.<sup>119</sup> Nevertheless, many would argue that national education agencies compelled individual institutions to comply with the Bologna Process’s changes without soliciting views from those most affected, i.e., the institutions themselves.<sup>120</sup> The distinction between top-down and ground-up initiatives is further complicated by the increasing reliance of both public and private institutions on funds from students and corporate partners.<sup>121</sup> Increased reliance on the private sector leads to increased demand for accountability, often through quality assurance measures.<sup>122</sup> Additionally, many Bologna Process changes intersect with other initiatives of international organizations

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> GARBEN, *supra* note 36, at 137.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 211.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> DEWITT, *supra* note 4, at 153.

<sup>122</sup> *Id.*



like the E.U., causing confusion for those charged with implementing changes.<sup>123</sup>

#### D. Difficulties Encountered by Initiatives

Scholars have criticized both the top-down and ground-up approaches to international higher education initiatives. The E.U.'s higher education initiatives are controversial because the E.U.'s legal authority in education issues is attenuated and unclear.<sup>124</sup> Additionally, the European Court of Justice (ECJ) has repeatedly expanded E.U. authority in education to an unprecedented degree.<sup>125</sup> In this way, the E.U.'s influence on higher education may be said to lack democratic legitimacy, as well as transparency and openness.<sup>126</sup> Similarly, the Bologna Process lacks transparency and the checks and balances inherent in formal organizations' structures.<sup>127</sup> Some scholars have noted that the "not-so-hidden agenda" of the Bologna Process participant nations is to mold European higher education institutions to resemble American higher education institutions.<sup>128</sup> Others claim that Bologna has contributed to European higher education outpacing American higher education in attractiveness to foreign students because of its greater transparency of degrees and qualifications.<sup>129</sup>

Beyond these broader governance issues, harmonization efforts have encountered implementation problems as well. A 2010 report identified the following difficulties with implementing the ERASMUS program: incompatibility of study programs, problems with credit calculation, problems with grade transfer, bureaucratic issues, attitude of professors who refuse to recognize courses, and a lack of information exchange.<sup>130</sup> While the Diploma Supplement has

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<sup>123</sup> GARBEN, *supra* note 36, at 211.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 137.

<sup>126</sup> *Id.* at 211.

<sup>127</sup> *Id.*

<sup>128</sup> GÜRÜZ, *supra* note 112, at 184.

<sup>129</sup> Dobbins & Martens, *supra* note 6, at 189.

<sup>130</sup> DICLE ET AL., *supra* note 62, at 72-81.

been a popular harmonization mechanism, only half of participating European countries had fully implemented it as of 2009.<sup>131</sup>

A 2010 APEC report noted similar problems with implementing its own international initiative.<sup>132</sup> The report lists as key issues the need to convince institutions of the value of additional documentation and the difficulty of providing diploma supplements to nations with different qualifications frameworks.<sup>133</sup> These issues highlight how diploma supplements that make mobility more feasible are distinct from qualifications frameworks, which aim to harmonize levels of education, content of levels, and learning outcomes.<sup>134</sup> Diploma supplements may be better suited for individual institutions that want to add an international dimension. On the other hand, the structures and classifications provided by qualifications frameworks are meant to be grafted onto national systems.<sup>135</sup> By interfering with the national structure of higher education—for example, by changing the number of years necessary for bachelor's degree equivalent—qualification frameworks can have consequences for a nation's economy and culture.<sup>136</sup> Despite governance and implementation difficulties, and despite the differences in culture and language involved, these harmonization efforts are inspiring nations around the world to discuss, plan, and implement new strategies to join the harmonized higher education of the future.<sup>137</sup>

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<sup>131</sup> APEC DIPLOMA SUPPLEMENT REPORT, *supra* note 31, at 25 (“Despite the commitment to issuing the [Diploma Supplement] to all graduates . . . by 2005, only half of the countries have managed to implement it fully by 2009.”).

<sup>132</sup> *Id.* at 15.

<sup>133</sup> *Id.*

<sup>134</sup> DANIELA ULICNA ET AL., *supra* note 40, at 5.

<sup>135</sup> *Id.*

<sup>136</sup> Wiseman & Baker, *supra* note 33, at 5. The economic and cultural consequences of implementing a qualifications framework are beyond the scope of this comment.

<sup>137</sup> Dobbins & Martens, *supra* note 6, at 188 (“Bologna has proven to be more than just a voluntary declaration, but has also created a platform for policy exchange and the emulation of best practice.”).

## III. ON THE GROUND IN THE U.S.

## A. Accreditation

The debate over whether higher education should become increasingly centralized is similar in the U.S and the E.U.. Looking specifically at accreditation provides an example of the issues surrounding centralization. In the U.S., hundreds of billions of taxpayer dollars are tied up in the accreditation of higher education institutions.<sup>138</sup> Accreditation is a key area affected by international initiatives to harmonize higher education because of its relation to the structure and content of higher education. Leaders in higher education organizations recently began to debate the merits of domestic harmonization, which could lead to participation in international harmonization.<sup>139</sup> Education scholar Philip Altbach explains that the “accreditation process is becoming internationalized and commercialized,” making it easier and more acceptable for an accreditation agency in, for example, the U.S. to offer its services to a higher education institution abroad.<sup>140</sup>

American accreditation is defined by the Council for Higher Education Accreditation (CHEA) as “a collegial process of self-review and peer review for improvement of academic quality and public accountability of institutions and programs.”<sup>141</sup> The distribution of power in accreditation in the U.S. is often referred to as “the triad” because power is divided relatively evenly between the state governments, federal government, and private accrediting

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<sup>138</sup> National Advisory Committee on Institutional Quality and Integrity, U.S. DEPT OF EDUC., <http://ed.gov/about/bdscomm/list/naciqi.html> (last modified Feb. 13, 2013); Brittingham, *supra* note 35, at 21.

<sup>139</sup> Scott Jaschik, *Wake-Up Call for American Higher Ed*, INSIDE HIGHER ED (May 21, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/05/21/bologna>.

<sup>140</sup> Philip G. Altbach & Jane Knight, *The Internationalization of Higher Education: Motivations and Realities*, 11 J. OF STUD. IN INT’L EDUC. 290, 301 (2007).

<sup>141</sup> COUNCIL FOR HIGHER EDUC. ACCREDITATION, STRENGTHENING HIGHER EDUCATION THROUGH STRENGTHENING ACCREDITATION 1-2 (Jan. 2000), [http://www.chea.org/pdf/chea\\_glance\\_2003.pdf](http://www.chea.org/pdf/chea_glance_2003.pdf).

agencies.<sup>142</sup> The triad is a unique approach that requires the cooperation and mutual trust of many actors.<sup>143</sup> State government roles vary, but generally the state government oversees licensing and consumer protection.<sup>144</sup> The federal government's oversight is directly linked to the funding it provides in the form of financial aid to institutions.<sup>145</sup> Accreditation agencies set standards for and measure quality of institutions, allowing the federal government to determine which institutions are eligible to receive funding.<sup>146</sup> These accrediting agencies are thought to act as a "bulwark" against potential government over-reaching.<sup>147</sup> Finally, the Tenth Amendment protects states' higher education choices, fostering the rich diversity that is unique to American higher education.<sup>148</sup>

In the United States, the Department of Education's National Advisory Committee on Institutional Quality and Integrity (NACIQI) is a key body for policy questions of higher education accreditation.<sup>149</sup> Since its creation through the Higher Education Act's 1992 amendments, NACIQI has made recommendations to the Secretary of Education regarding accreditation.<sup>150</sup> Each of the Secretary of Education, the Senate, and the House appoints six members to form the eighteen member committee.<sup>151</sup> In general, NACIQI determines the criteria for establishing and maintaining accrediting agencies that are reliable and maintain high standards.<sup>152</sup> Individual accreditation

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<sup>142</sup> Peter Ewell & Dennis Jones, *Higher Education Quality Assurance in America: Approaching a Crisis*, in NAT'L ADVISORY COMM. ON INST'L QUALITY & INTEGRITY, U.S. DEP'T OF EDUC., REPORT OF THE FEBRUARY 3-4, 2011 MEETING 42, 42 (Feb. 3, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2-11-presenters.html>.

<sup>143</sup> Brittingham, *supra* note 35, at 14.

<sup>144</sup> *Id.* at 21.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 24.

<sup>147</sup> ECKEL & KING, *supra* note 99, at 4.

<sup>148</sup> Ass'n of Specialized & Prof'l Accreditors, *What is the "Triad," in* NAT'L ADVISORY COMM. ON INST'L QUALITY & INTEGRITY, U.S. DEP'T OF EDUC., REPORT OF THE FEBRUARY 3-4, 2011 MEETING 76, 76 (Feb. 3, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2-11-presenters.html>.

<sup>149</sup> Ewell & Jones, *supra* note 142.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

agencies often cover a region or a particular kind of university or program.<sup>153</sup>

At a recent NACIQI forum, stakeholders representing key organizations and researchers highlighted the current debate over the involvement of the federal government in the traditionally grassroots industry of accreditation.<sup>154</sup> Clifford Adelman, a leading education researcher, explained that, using grants as an incentive, the federal government is encouraging accreditation agencies to try their own version of a Degree Qualifications Profile (DQP).<sup>155</sup> In response to this federal push, Adelman advises the federal government to “please stay away and let this be a ground-up phenomenon, as the competency based DQP is truly a transformational challenge to U.S. higher education.”<sup>156</sup>

The technical and philosophical challenges to a national qualifications framework that could extend beyond U.S. borders are immense. The U.S. accreditation system is praised for its cost-efficiency, self-governed and partly volunteer-based structure, and flexibility.<sup>157</sup> Judith Eaton, president of CHEA, observed that taxpayers are pressuring the federal government to become more involved in the higher education system in which it invests so many taxpayer dollars.<sup>158</sup> Yet the U.S. accreditation and higher education systems can become internationalized without losing their grassroots nature. Similarly, the federal government should not react to public pressure by involving itself in accreditation with a heavy hand.

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<sup>153</sup> *Id.*

<sup>154</sup> Judith Eaton, *Roles and Relationships: Accreditation and the Federal Government*, in NAT’L ADVISORY COMM. ON INST’L QUALITY & INTEGRITY, U.S. DEPT OF EDUC., REPORT OF THE FEBRUARY 3-4, 2011 MEETING 37, 37 (Feb. 3, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2-11-presenters.html> (“However unexpectedly, we have arrived at a decision point about accreditation and the federal government.”).

<sup>155</sup> Clifford Adelman, *Remarks on the Next Reauthorization of the Higher Education Act*, in NAT’L ADVISORY COMM. ON INST’L QUALITY & INTEGRITY, U.S. DEPT OF EDUC., REPORT OF THE FEBRUARY 3-4, 2011 MEETING 1, 1 (Feb. 3, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2-11-presenters.html>.

<sup>156</sup> *Id.*

<sup>157</sup> Brittingham, *supra* note 35, at 11.

<sup>158</sup> Eaton, *supra* note 154, at 3.

Rather, the federal government can use its position in relation to both international and domestic education to harness the invaluable experiences and expertise of U.S. accreditors and other stakeholders.

#### B. Additional Examples

Other efforts to harmonize higher education demonstrate the U.S.'s capacity for implementing programs similar the harmonization initiatives abroad. The Carnegie Classifications and Complete College America (CCA) are ground-up phenomena that demonstrate how classifications and an emphasis on accountability and transparency have already led to an increasingly harmonized higher education system at home. The Carnegie Classifications, first published in 1973, represent the "leading framework" used by U.S. higher education institutions to classify and organize higher education.<sup>159</sup> These ubiquitous classifications are used to determine qualification for grants and other funding, as well as to categorize a wide variety of institutions for comparison in widely-read publications such as the U.S. News and World Report's college and university rankings.<sup>160</sup> The Carnegie Foundation itself has noted that the value placed on its classifications can create significant pressure on institutions to maintain or change their classification.<sup>161</sup> The mutual interests of individual institutions and the federal government in these classifications make them well suited for use in future harmonization initiatives, as a model or a starting point.<sup>162</sup>

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<sup>159</sup> *Carnegie Classifications*, CARNEGIE FOUND., <http://classifications.carnegiefoundation.org/> (last visited Mar. 28, 2013).

<sup>160</sup> ALEXANDER C. MCCORMICK & CHUN-MEI ZHAO, RETHINKING AND REFRAMING THE CARNEGIE CLASSIFICATION 55 (2005), <http://classifications.carnegiefoundation.org/downloads/rethinking.pdf>; Alexander C. McCormick, *Hidden in Plain View*, INSIDE HIGHER ED (May 10, 2007, 4:00 AM), <http://www.insidehighered.com/views/2007/05/10/mccormick>.

<sup>161</sup> MCCORMICK & ZHAO, *supra* note 160, at 55.

<sup>162</sup> JOHN AUBREY DOUGLASS, CTR. FOR STUD. IN HIGHER EDUC., THE CARNEGIE COMMISSION AND COUNCIL ON HIGHER EDUCATION: A RETROSPECTIVE 14 (2005), <http://cshe.berkeley.edu/publications/docs/ROP.Douglass.Carnegie.14.05.pdf>.

Complete College America, a nonprofit organization, works with the National Governors' Association (NGA)<sup>163</sup> to improve college graduation rates in each state and to “build consensus for change” among key players at the state and national levels.<sup>164</sup> CCA was founded in 2009 and is supported by organizations like the Carnegie Corporation, the Bill and Melinda Gates Foundation, and the Lumina Foundation.<sup>165</sup> Through the Complete to Compete program of CCA, states use common metrics to measure progress and outcomes.<sup>166</sup> Progress metrics measure enrollment and success in remedial education, success in first year college courses, credit accumulation, retention rates, and course completion.<sup>167</sup> Outcome metrics measure degrees awarded, graduation rates, transfer rates, and time and credits necessary to achieve a degree.<sup>168</sup> CCA recommends that states generate common definitions for certain metrics terms, such as “remedial education courses.”<sup>169</sup> The technical guide to the common metrics also lists disciplines and defines which categories of courses fall into each discipline.<sup>170</sup> By beginning this process of common definitions, states are already taking steps toward a more coordinated and cooperative system. Other key examples of harmonization efforts in the U.S. include the Association of American Colleges and Universities' Liberal Education and America's Promise (LEAP) initiative,<sup>171</sup> the Lumina Foundation's Tuning USA

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<sup>163</sup> *Common Metrics*, COMPLETE COLL. AM., [http://www.completecollege.org/path\\_forward/commonmetrics/](http://www.completecollege.org/path_forward/commonmetrics/) (last visited Mar. 28, 2013).

<sup>164</sup> *Complete College America*, COLL. BOARD, <http://completionarch.collegeboard.org/content/complete-college-america>.

<sup>165</sup> *About Us*, COMPLETE COLL. AM., <http://www.completecollege.org/about/> (last visited Mar. 28, 2013).

<sup>166</sup> *Common Metrics*, *supra* note 163.

<sup>167</sup> NGA CTR. FOR BEST PRACTICES, COMPLETE TO COMPETE: COMMON COLLEGE COMPLETION METRICS: TECHNICAL GUIDE 2 (2010), <http://www.nga.org/files/live/sites/NGA/files/pdf/1011COMMONTECHGUIDE.PDF>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 12.

<sup>170</sup> *Id.* at 18.

<sup>171</sup> *Liberal Education and America's Promise (LEAP)*, ASS'N OF AM. COLLS. & UNIVS., <http://www.aacu.org/leap/> (last visited Mar. 28, 2013).

project,<sup>172</sup> and the Common Core State Standards Initiative, which is also a project of the NGA.<sup>173</sup>

Through these programs, the U.S. demonstrated a strong capacity to create common terminology, standards, and qualification frameworks. These programs also demonstrate that, on a state and regional level, certain common classifications already exist despite the absence of formal measures.

#### IV. COMING TOGETHER: CONSIDERATIONS & RECOMMENDATIONS

##### A. What We Measure Signals What We Value<sup>174</sup>

International soft governance can help unify national policies, but often at the price of transparency and accountability found in the policies of a legitimate, binding authority.<sup>175</sup> In the U.S., higher education institutions and organizations are accustomed to dealing with the federal government on a voluntary basis.<sup>176</sup> Over time federal power in K-12 education has expanded, requiring increased cooperation on the local and state levels.<sup>177</sup> Similar to international organizations' influence over national education policies, the U.S. federal government influences local and state entities that act relatively independently.<sup>178</sup> In higher education, the federal

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<sup>172</sup> TUNING EDUC. STRUCTURES USA, <http://tuningusa.org/> (last visited Jan. 31, 2012).

<sup>173</sup> COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/> (last visited Mar. 28, 2013).

<sup>174</sup> Quoted from COMPLETE COLL. AM., UNIFORMLY MEASURE PROGRESS AND SUCCESS: ESSENTIAL STEPS FOR STATES 1 (no date), <http://www.completecollege.org/docs/CCA%20Essential%20Steps%20Common%20Measures%20of%20Progress%281%29.pdf>.

<sup>175</sup> GARBEN, *supra* note 36, at 181.

<sup>176</sup> ECKEL & KING, *supra* note 99, at 3-4.

<sup>177</sup> GAIL L. SUNDERMAN & JIMMY KIM, EXPANSION OF FEDERAL POWER IN AMERICAN EDUCATION: FEDERAL-STATE RELATIONSHIPS UNDER THE NO CHILD LEFT BEHIND ACT, YEAR ONE 12 (2004), <http://civilrightsproject.ucla.edu/research/k-12-education/nclb-title-i/expansion-of-federal-power-in-american-education-federal-state-relationships-under-the-no-child-left-behind-act-year-one/sunderman-kim-expansion-federal-power-american.pdf>.

<sup>178</sup> *Id.* at 15.



government uses the provision of financial aid funds to dictate certain requirements, thereby involving itself in higher education policy-making.<sup>179</sup> This soft governance-like control allows the federal government to mold higher education like it molds K-12 education.<sup>180</sup> This is especially true when higher education policy relates to areas like international affairs or economic competitiveness, which are constitutionally assigned powers of the national government.<sup>181</sup>

On both national and international levels, soft governance control can lead to the setting of norms in higher education. These norms might determine how we view quality of education, the value of particular subject areas, or the legitimacy of institutions or higher education structures. Moreover, specific educational practices not deemed valuable and legitimate by the policy-making entity may go unnoticed and eventually be lost. In this way, the unique characteristics of individual institutions, states, or nations may not survive an increasingly harmonized higher education system.

Nevertheless, on an international scale nations are incentivized to fall in line with the harmonization process. The incentive may come from the international organization itself, or the international aspect may be an attractive shell for national policies that have received prior resistance but became legitimized through an international organization's support.<sup>182</sup> As the global movement toward harmonization continues, it is important for the U.S. to become an active participant in shaping the future of higher education. Equally important, however, is that the U.S. examine its own motives for participation. While the U.S. may be accustomed to a position of leadership, even dominance, in its foreign affairs, this approach is unlikely to yield positive results in an area already dominated by the efforts of other nations.<sup>183</sup>

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<sup>179</sup> ECKEL & KING, *supra* note 99, at 3.

<sup>180</sup> *Id.* at 3-4.

<sup>181</sup> Carol E. Head, Comment, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 124 (2000).

<sup>182</sup> GARBEN, *supra* note 36, at 213-15.

<sup>183</sup> Stephen M. Walt, *Taming American Power*, 84 FOREIGN AFF. 105, 112 (2005).

The American harmonization measures described above demonstrate that the U.S.'s values correlate with those of international organizations. These values in the higher education context emphasize reaching a consensus on classification measures and stress accountability and transparency. Consensus, accountability, and transparency lend legitimacy to initiatives.

## B. Recommendations

At present, the U.S. has three options with regard to international higher education initiatives: 1) continue its policy of abstinence on the national level and mild participation on an institutional level, 2) attempt to supersede current efforts by generating its own qualification framework and popularizing it with other nations, or 3) engage cooperatively with international organizations as a key partner.

### 1. *Options One and Two*

Given the potential benefits of participation, the first option is not recommended. Participation can provide a streamlined means for bringing students to U.S. colleges and universities, thus contributing to the U.S.'s competitive edge in a global economy, and it would allow the U.S. to be an integral part of a key area of international development. The second option, which calls for attempting to supersede current efforts with a new, perhaps blended, framework, is feasible. The U.S. is uniquely positioned for this approach because of its connection to first-world APEC and European nations. Specifically, the U.S. is a member nation of APEC and also maintains significant cultural similarities and economic links to European nations. Additionally, the U.S. already is heavily involved with the World Bank and the OECD in education research, which contributes to the spread of an "institutionalized world culture" of education.<sup>184</sup> The U.S. and other wealthy nations produce the most education research, which in turn allows them to have the most influence on education trends.<sup>185</sup> Most importantly for U.S. impact on APEC nations, western (U.S. and European) higher

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<sup>184</sup> Wiseman & Baker, *supra* note 33, at 5.

<sup>185</sup> *Id.* at 6.

education credentials are given the most weight and legitimacy around the world.<sup>186</sup> By blending the experimental efforts in European and APEC nations, the U.S. could provide the missing link in harmonizing higher education across the globe.

Implementing a blended harmonization framework could provide U.S. higher education with an opportunity for mutually beneficial partnerships with other nations' higher education systems and individual institutions. European harmonization frameworks are still at an experimentation stage and have not been universally adopted, leaving room for U.S. influence. The U.S. system, specially adapted to encompass diverse institutions and function on a voluntary basis, is ideal for international expansion.

The U.S., APEC, and E.U. nations have already demonstrated sufficiently similar guiding principles in terms of education. All three place a premium on global competition and preparation for the changing job market, as well as emphasize goals of quality and equity in education generally.<sup>187</sup> The U.S. must consider all of the domestic veto players that might object to international participation. Adding an international dimension to higher education necessarily requires that the federal government act as liaison between the domestic and the international education communities.<sup>188</sup> Through NACIQI, however, the federal government already has in place the beginnings of a representative group. Additionally, organizations like CHEA

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<sup>186</sup> *Id.*

<sup>187</sup> Laurie Halverson, WHITE HOUSE, <http://www.whitehouse.gov/issues/education> (last visited Mar. 28, 2013) ("Our nation's economic competitiveness and the path to the American Dream depend on providing every child with an education that will enable them to succeed in a global economy that is predicated on knowledge and innovation."); *Strategic Framework for Education and Training*, EUR. COMM'N, [http://ec.europa.eu/education/lifelong-learning-policy/framework\\_en.htm](http://ec.europa.eu/education/lifelong-learning-policy/framework_en.htm) (last updated Feb. 7, 2013) ("Politicians at the European level have recognised that education and training are essential to the development of today's knowledge society and economy."); *4th APEC Education Ministerial Meeting (AEMM) in Lima Peru*, ASIA-PACIFIC ECON. COOP., [http://hrd.apec.org/index.php/4th\\_APEC\\_Education\\_Ministerial\\_Meeting\\_%28AEMM%29\\_in\\_Lima\\_Peru](http://hrd.apec.org/index.php/4th_APEC_Education_Ministerial_Meeting_%28AEMM%29_in_Lima_Peru) (last visited Mar. 28, 2013).

<sup>188</sup> Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, U.S. DEPT. OF ST. (June 1, 1999), <http://fpc.state.gov/6172.htm>.

have already been strengthening their international dimension in response to a globalizing world.<sup>189</sup>

Because of the complexity of American higher education, a combined ground-up and top-down approach to development would be preferable. The federal and state governments, regional accreditors, and other stakeholders such as professional organizations would need to be persuaded of the necessity of framework development. Because effective persuasion could require significant time and resources, higher education organizations and accreditation agencies ought to develop a framework at a series of Bologna-style meetings. Institutions should be allowed to opt out of the framework to retain their independence. The federal government may consider offering financial incentives to institutions for participation, but this is not recommended. Financial incentives may present institutions with a false choice because they cannot in reality afford to dismiss a valuable funding source. Therefore, any financial incentives would ensure a largely top-down approach which might not reap the full benefits of the U.S.'s diverse higher education system.

U.S. policymakers strive to maintain America's leadership role in higher education.<sup>190</sup> A blended global qualifications framework would allow the U.S. the control it needs to participate in international harmonization while permitting other nations to share and contribute to the wealth of knowledge in the U.S. However, there are crucial concerns over taking a leadership role. Domestically, one of the higher education community's main concerns has been the loss of the value of a uniquely American, diverse higher education system. This concern could be addressed by requiring that developers and implementers are experts who are sensitive to the many unique qualities of higher education. A framework that seeks to incorporate the diverse higher education systems of nations around the world

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<sup>189</sup> CHEA *International Quality Group*, COUNCIL FOR HIGHER EDUC. ACCREDITATION, <http://www.cheainternational.org/default.asp> (last visited March 17, 2013).

<sup>190</sup> CHERYL OLDHAM, SEC'Y OF EDUC.'S COMM'N ON THE FUTURE OF HIGHER EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION vi-vii (2006), <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/pre-pub-report.pdf>.

would by necessity be broad and likely encompass the unique qualities of American higher education. Internationally, an American-led framework could easily lead to the dominance of American values in higher education, which in turn could lead to the homogenization of higher education globally. These concerns should not be minimized and should weigh heavily in favor of U.S. involvement in this area.

## 2. *Option Three*

The U.S. is also uniquely positioned to make a tremendous show of good faith to the international community by engaging cooperatively with international organizations as a key partner. Rather than taking the lead, the U.S. can take steps to join existing initiatives that best support its goals. With the preeminent higher education network in the world, the U.S. is in a position to be influential without being aggressive. American universities are more likely to attract top students from around the world and influence the higher education of other nations.<sup>191</sup> The U.S. manages to combine both quality and quantity of universities, while maintaining an atmosphere of academic freedom and freedom of expression that fosters diversity and growth.<sup>192</sup> Significant time and resources would be necessary to emulate this approach in other nations.<sup>193</sup>

The benefits of an American cooperative effort with other higher education systems are plentiful. By demonstrating a willingness to compromise, cooperate, and contribute our nation's strengths to a global system, the U.S. makes a show of good faith to the world that could be invaluable in future international relations. Additionally, other participating nations are aided by increased mobility to the U.S. for students and educated workers. With increased mobility, students from all nations have the opportunity to learn skills and different perspectives abroad that can contribute to

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<sup>191</sup> Phil Baty, *The World University Rankings: Measure by Measure: the US is the Best of the Best*, TIMES HIGHER EDUC. (Sept. 16, 2010), <http://www.timeshighereducation.co.uk/world-university-rankings/2010-2011/analysis-usa-top-universities.html>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

the human capital at home. The U.S. Supreme Court has recognized the importance of diversity in higher education for contributing to a “robust exchange of ideas.”<sup>194</sup>

The same parallels between the U.S. and other nations that support the feasibility of an American-led blended framework can also support the feasibility of U.S. cooperation with other nations and international organizations. Because this is an equally viable alternative to taking the reins of international initiatives, the next step should be significant investigation on the part of U.S. policymakers into the will and capacity in the U.S. for harmonization. Research should focus on joint studies with key players like the E.U. and APEC. The U.S. should consider how countries outside of APEC and the E.U., especially South American and African nations, could fit into the new scheme. Additionally, research into a future framework should reflect a growing movement toward massive open online courses (MOOCs) and the potential for the traditional structures of higher education to be revolutionized as a result of the internet. Armed with knowledge, the U.S. will be better equipped to choose an appropriate approach to the international higher education of the future.

Technology and increased mobility have contributed to greater interaction between national economies, politics, and cultures. As a leader in higher education, the U.S. is in a position of influence for the future of international higher education mobility initiatives. Participation and leadership in this as yet unsettled area of higher education should be a part of a broader push to revolutionize higher education through technology and a global perspective. Higher education institutions should not fear losing their unique characteristics in the face of globalization, as part of this broader push should include enhancing the connection between institutions and their surrounding communities to combat the pull of homogenization. Higher education must bear the tension inherent in globalization between viewing other nations as competitors or as respected, equal partners. Though controversial, globalization can occur peacefully and bring positive change if nations are willing to proceed thoughtfully and are open to compromise. The U.S. should

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<sup>194</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

be training a generation of empathetic leaders for a globalized world, and the efficient movement of students across borders is crucial to exposing future leaders to one another in a structured learning environment.

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## CONSEQUENCES OF THE ARAB SPRING: HOW SHARI'AH LAW AND THE EGYPTIAN REVOLUTION WILL IMPACT IP PROTECTION AND ENFORCEMENT

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### INTRODUCTION

On February 11, 2011, thousands of Egyptians in Tahrir Square celebrated Hosni Mubarak's departure and, with him, thirty years of rule by an oppressive regime.<sup>1</sup> While Egyptians celebrated, political commentators considered the impact of the Egyptian revolution on peace in the Middle East.<sup>2</sup> Some feared that an extreme sect of Islamic fundamentalists might be behind the revolution and

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<sup>1</sup> See David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES, Feb. 12, 2011, at A1, <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html?pagewanted=all>.

<sup>2</sup> E.g., Douglas Bloomfield, *Will Egypt's Revolution Trample the Peace Process?*, JERUSALEM POST, <http://www.jpost.com/Opinion/Columnists/Article.aspx?id=206445> (last updated Feb. 2, 2011); Jennifer Rubin, *Egypt's Revolution Has Nothing to Do with Israel*, WASH. POST (Feb. 1, 2011, 9:00 AM), <http://voices.washingtonpost.com/right-turn/2011/02/egypt-has-nothing-to-do-with-i.html>; Jack Shenker, *Egypt Protesters Play Down Islamist Party's Role*, THE GUARDIAN, Jan. 31, 2011 <http://www.guardian.co.uk/world/2011/jan/31/egypt-protesters-islamists-muslim-brotherhood>.



pondered the impact of replacing the “Arab world’s first secular dictatorship”<sup>3</sup> with a traditionalist regime, likening Egypt to Iran thirty years before.<sup>4</sup>

Egypt’s pivotal role in maintaining stability in the Middle East over the last forty years makes its current instability a source of trepidation for and businesspersons.<sup>5</sup> This comment addresses these concerns relating to intellectual property (IP) rights under Islamic law.<sup>6</sup> Section II defines the IP protection requirements of the World Trade Organization (WTO) under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and examines the sources and schools of Islamic jurisprudence.<sup>7</sup> Section II also considers the harmony between a nation’s obligations under the TRIPs agreement and Islamic law.<sup>8</sup> Section III expands upon Egypt’s role in international business and policy, including its membership in the WTO and ratification of the TRIPs agreement.<sup>9</sup> In addition, Section III compares the implementation of IP protection in Jordan and Saudi Arabia, the former a secular Islamic nation and the latter a more traditionalist regime.<sup>10</sup> Section IV addresses the application of a secular or traditionalist approach under Egypt’s new government, and how either could affect IP rights.<sup>11</sup>

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<sup>3</sup> Kirkpatrick, *supra* note 1.

<sup>4</sup> See, e.g., Richard Allen Greene, *Egypt’s Muslim Brotherhood: A Force to be Feared?*, CNN (Jan. 31, 2011), [http://articles.cnn.com/2011-01-31/world/egypt.muslim.brotherhood\\_1\\_egypt-s-muslim-brotherhood-ayman-nour-protests?\\_s=PM:WORLD](http://articles.cnn.com/2011-01-31/world/egypt.muslim.brotherhood_1_egypt-s-muslim-brotherhood-ayman-nour-protests?_s=PM:WORLD); Michael Slackman, *Islamist Group is Rising Force in a New Egypt*, N.Y. TIMES, Mar. 24, 2011, at A1.

<sup>5</sup> See *The Global Fallout from the Middle East Crisis*, BUS. STANDARD (Mar. 14, 2011, 6:44 AM), <http://www.business-standard.com/india/news/the-global-fallout-frommiddle-east-crisis/428442/>.

<sup>6</sup> The author uses Islamic Law in the sense of governmental application of the principles of the Shari’ah as applied to the nation’s system of justice. Islamic law and Shari’ah law are used interchangeably throughout this comment.

<sup>7</sup> See discussion *infra* Parts II.A-B.

<sup>8</sup> See discussion *infra* Part II.C.

<sup>9</sup> See discussion *infra* Part III.C.

<sup>10</sup> See discussion *infra* Parts III.A-B.

<sup>11</sup> See discussion *infra* Part IV.

This comment concludes that IP rights find substantial protection in Islamic nations.<sup>12</sup> Many Islamic law nations have implemented IP protection laws and have become members of the WTO.<sup>13</sup> Commentators concerned about the future of IP rights in Egypt can remain confident that changes in Egypt's governmental structure will not substantially affect its IP protection scheme.<sup>14</sup>

## II. IP, TRIPS, AND ISLAMIC LAW

To competently discuss IP rights under Islamic law, one must understand the nature of Islamic jurisprudence and the role of IP rights in international trade. This section explores the requirements imposed upon WTO member nations under the TRIPs agreement, the sources and schools of Islamic law, and the interaction of Islamic jurisprudence and IP protection. This section concludes with a discussion of the Islamic law of contracts and the role international treaties play in Islamic lawmaking.

### A. TRIPs

In 1986, in an extended negotiation known as the Uruguay Round, members of the international community considered creating a global trade organization.<sup>15</sup> The goal was to stabilize international trade by improving the established guidelines of the 1947 General Agreement on Tariffs and Trade (GATT 1947).<sup>16</sup> The Uruguay Round's conclusion in 1994 established the WTO along with several binding agreements for WTO member nations.<sup>17</sup> The TRIPs

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<sup>12</sup> See *infra* Part V.

<sup>13</sup> See *Members and Observers*, WORLD TRADE ORGANIZATION, [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last updated Jul. 23, 2008).

<sup>14</sup> See discussion *infra* Part IV.

<sup>15</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

agreement defines the minimal IP protection required of WTO members.<sup>18</sup>

The TRIPs agreement is split into seven parts.<sup>19</sup> Part I provides the basic principles of the agreement, requiring a nation to provide non-nationals with IP protection equal to that afforded nationals.<sup>20</sup> Part II provides specific protection requirements for copyrights, patents, trademarks, and trade secrets, among others.<sup>21</sup> Part III requires a signatory nation to implement domestic laws for the enforcement of IP right and remedies for IP infringement.<sup>22</sup> Parts IV through VII discuss IP related procedures, dispute resolution, and other signatory arrangements.<sup>23</sup>

Specifically, the TRIPs agreement requires that copyright protection be extended to literary and artistic works in all forms, including books, pamphlets, lectures, musical compilations, choreographic works, drawings, paintings, sculptures, architecture, and maps.<sup>24</sup> The agreement also adds computer programs to the list of protected copyright media and requires that the author be afforded protection for at least fifty years.<sup>25</sup> In addition, the TRIPs agreement requires that patent protection be available for products or processes that “are new, involve an inventive step and are capable of industrial application.”<sup>26</sup> However, the agreement permits a nation to exclude protection for certain medical methods and other inventions

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<sup>18</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter “TRIPs Agreement”], [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* arts. 1-8.

<sup>21</sup> *Id.* arts. 9-40.

<sup>22</sup> *Id.* arts. 41-61.

<sup>23</sup> TRIPs Agreement, *supra* note 18, arts. 62-73.

<sup>24</sup> *See id.* art. 9. Article nine implements the requirements of the Berne Convention, which protects the listed media. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30 [hereinafter Berne Convention], [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

<sup>25</sup> TRIPs Agreement, *supra* note 18, arts. 10, 12.

<sup>26</sup> *Id.* art. 27.

“necessary to protect *ordre public* or morality.”<sup>27</sup> Inventors must be afforded at least twenty years of patent protection under the TRIPs agreement.<sup>28</sup>

The TRIPs agreement also requires trademark protection be provided for signs and symbols “capable of distinguishing [] goods and services.”<sup>29</sup> Third parties may not use an identical or similar mark for identical or similar business activities if such use would cause a “likelihood of confusion” for consumers.<sup>30</sup> Adhering nations must create a system for trademark registration, and registration must be indefinitely renewable for terms of at least seven years.<sup>31</sup> Finally, the TRIPs agreement requires protection of trade secrets, defined as information (1) that is “not . . . generally known among or readily accessible to” competitors, (2) that “has commercial value because it is secret,” and (3) for which the holder of the information has taken steps to keep it secret.<sup>32</sup>

Some commentators criticize the TRIPs agreement for its adverse effect on developing countries.<sup>33</sup> Others<sup>34</sup> assert that IP protection in developing nations increases innovative activities and foreign investment, thereby benefiting developing economies.<sup>35</sup> What

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* art. 33.

<sup>29</sup> *Id.* art. 15.

<sup>30</sup> TRIPs Agreement, *supra* note 18, art. 16.

<sup>31</sup> *Id.* arts. 15, 18.

<sup>32</sup> *Id.* art. 39.

<sup>33</sup> E.g., Sean Pager, *TRIPS: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 221-22 (2006) (asserting that the WTO has over-exercised its authority by enacting affirmative regulations on member nations); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 370-71 (2006) (arguing that the TRIPs agreement needs reform to advance the agenda of developing nations).

<sup>34</sup> Supporters of the TRIPs agreement are, for the most part, pundits of developed nations that benefit from the international enforcement of IP rights.

<sup>35</sup> See Danielle Tully, *Prospects for Progress: The TRIPS Agreement and Developing Countries After the DOHA Conference*, 26 B.C. INT'L & COMP. L. REV. 129, 137 (2003).

is clear is that any nation wishing to benefit from membership in the WTO must enact IP laws in accordance with the TRIPs agreement.<sup>36</sup>

## B. Islamic Jurisprudence

This section explores the primary and secondary sources of Islamic law and the four schools of Sunni Islamic jurisprudence: Hanafi, Shafii, Maliki, and Hanbali.<sup>37</sup> The sources of Islamic law and the schools of jurisprudence require concurrent discussion because each school uses different terminology to reflect similar principles.<sup>38</sup> Accordingly, discussion of a source is difficult without also referencing the related school.

### 1. *Sources of Islamic Law*

The Qur'an and the Sunnah (and Hadith) are the primary sources of Islamic law.<sup>39</sup> The Qur'an is the word of Allah as spoken to the prophet Muhammad.<sup>40</sup> Because the Qur'an is the highest source of law under Shari'ah, no other source may contradict its principles.<sup>41</sup> The Sunnah is a recording of the manner and practice of the Prophet Muhammad's life and provides a guide for Muslim behavior.<sup>42</sup> Similarly, Hadith refers to the recorded sayings and opinions that the Prophet Muhammad verbalized during his life as well as his approval or disapproval of activities he witnessed.<sup>43</sup>

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<sup>36</sup> See WTO Agreement, *supra* note 15; TRIPs Agreement, *supra* note 18.

<sup>37</sup> M. Charif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 142 n.18 (2002).

<sup>38</sup> See Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 57 (2002) (noting the different Arabic terms meaning interpretation in the public interest).

<sup>39</sup> Bassiouni & Badr, *supra* note 37, at 139.

<sup>40</sup> Abdal-Haqq, *supra* note 38, at 45.

<sup>41</sup> Silvia Beltrametti, *The Legality of Intellectual Property Rights under Islamic Law*, in THE PRAGUE YEARBOOK OF COMPARATIVE LAW 2009 55, 59 (Mach, T. et al. eds., 2010), <http://www.digitalislam.eu/article.do?articleId=2729>.

<sup>42</sup> *Id.* at 60.

<sup>43</sup> Abdal-Haqq, *supra* note 38, at 46-47.

Islamic scholars use the Sunnah and Hadith in combination to provide the second primary source of Shari'ah law.<sup>44</sup>

Where the principles of the Qur'an and Sunnah do not adequately adjudicate a legal issue, Islamic scholars and jurists use Fiqh<sup>45</sup>—the process of deducing and applying Shari'ah principles—to reach a legal determination.<sup>46</sup> The methodologies of Fiqh are numerous, and it is in the application of Fiqh that the several schools of Shari'ah diverge.<sup>47</sup> However, all four schools recognize the fundamental methodologies of Ijma and Qiyas: reasoning by consensus and analogy, respectively.<sup>48</sup>

Ijma is a consensus regarding the interpretation or application of Shari'ah.<sup>49</sup> Where Islamic scholars or members of the community reach a consensus regarding a legal issue, their interpretation receives deference for future generations.<sup>50</sup> This legal principle is not dissimilar to *stare decisis*<sup>51</sup> under American common law. All schools of Shari'ah recognize the consensus of the Sahaba (followers of the Prophet Muhammad); however, not all schools recognize the consensus of scholars from later eras.<sup>52</sup>

Qiyas is reasoning by analogy.<sup>53</sup> Each individual necessarily reasons by analogy in reaching a consensus.<sup>54</sup> Because Ijma represents

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<sup>44</sup> *Id.* at 47.

<sup>45</sup> This term can also be used in reference to the collective body of laws arising from Fiqh. *Id.* at 36. However, for the purposes of this comment, Fiqh is used in reference to the method of reasoning.

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *See id.* at 54-58; Bassiouni & Badr, *supra* note 37, at 140-41.

<sup>48</sup> Abdal-Haqq, *supra* note 38, at 73.

<sup>49</sup> *Id.* at 54-55.

<sup>50</sup> *Id.*

<sup>51</sup> Latin in origin, *stare decisis* means “to stand by things decided.” BLACK’S LAW DICTIONARY 1537 (9th ed. 2009). The legal doctrine in American common law requires judges to follow the precedent set by previous courts. *Id.* *Stare decisis* helps to ensure that society can rely on court decisions to guide future behavior, an important aspect of a common law legal system. *See id.*

<sup>52</sup> Abdal-Haqq, *supra* note 38, at 55-56.

<sup>53</sup> *Id.* at 56.

the consensus of several individuals reasoning by analogy, Islamic scholars grant Ijma greater authority in the hierarchy of Fiqh methodology.<sup>55</sup> The schools of jurisprudence differ in the level of authority provided by Qiyas as well as their willingness to engage in the methodology.<sup>56</sup>

Although there are numerous other Fiqh methodologies,<sup>57</sup> this comment additionally considers only Istislah. The term used to represent this methodology varies by school,<sup>58</sup> but the principle invoked is interpretation in the public interest.<sup>59</sup> Like public policy considerations in American common law, Islamic jurists use Istislah to establish legal doctrines and reach legal determinations where the other methodologies fall short.<sup>60</sup>

## 2. *Schools of Islamic Law*

The four Sunni<sup>61</sup> schools of Islamic jurisprudence—each named after the founding scholar of its methodological principles<sup>62</sup>—are Hanbali, Shafii, Maliki, and Hanafi.<sup>63</sup> Each school differs in its application of Fiqh, either by recognizing different doctrines, by

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<sup>54</sup> All secondary sources provide legal principles in the absence of primary source authority. In reaching a consensus, therefore, each individual uses an analogy to a primary source principle and agrees on the legal result. *See id.* at 56.

<sup>55</sup> *Id.*

<sup>56</sup> For example, Hanbali scholars employ Qiyas only as a last resort. *Id.* at 73.

<sup>57</sup> For a discussion of additional Fiqh methods such as Istihab—presumption of continuity, Urf—local custom, and Ijtihad—individual reasoning, see Abdal-Haqq, *supra* note 38, at 58-59.

<sup>58</sup> Istislah is known as Istihsan in the Hanafi School and Masalih Al-Mursalah in the Maliki School. *Id.* at 57.

<sup>59</sup> *Id.*

<sup>60</sup> Bassiouni & Badr, *supra* note 38, at 158-59.

<sup>61</sup> The Jafari School is an additional Shiite school of jurisprudence. Abdal-Haqq, *supra* note 38, at 74. Because the nations discussed herein are predominantly Sunni, this comment does not discuss the Shiite school.

<sup>62</sup> *Id.* at 67-68.

<sup>63</sup> Bassiouni & Badr, *supra* note 37, at 142 n.18.

giving greater or lesser authority to them, or by applying them differently.<sup>64</sup>

Hanbali is the school from which Saudi scholars base their system of methodology and reasoning.<sup>65</sup> The Hanbali School uses a more literal interpretation of the primary sources.<sup>66</sup> Additionally, Hanbali scholars recognize Ijma (consensus) only of the Sahaba<sup>67</sup> and refuse to apply Ijma to subsequent eras because of the divergence of thought.<sup>68</sup> Finally, Hanbali scholars seldom undertake Istislah and resort to Qiyas only as a last resort.<sup>69</sup>

The Shafii School is the predominant school in Egypt and throughout the western regions of the Middle East.<sup>70</sup> Shafii, the school's founder, is credited with the initial "systemiz[ation] of the fundamental principles of Fiqh."<sup>71</sup> Shafii scholars entirely reject Istislah and undertake Qiyas only to the extent a legitimate analogy can be drawn.<sup>72</sup> Shafii scholars accept Ijma of the Sahaba as well as other eras, separating themselves from Hanbali scholars.<sup>73</sup>

Many commentators regard the Maliki School as the most moderate of the four schools because it permits methods of interpretation beyond those of the other three.<sup>74</sup> In interpreting Shari'ah, Maliki scholars place special emphasis on the historical custom and practices of the Medina<sup>75</sup> people who lived among the Prophet Muhammad during the final ten years of his life.<sup>76</sup> In fact,

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<sup>64</sup> Abdal-Haqq, *supra* note 38, at 70-75.

<sup>65</sup> *Id.* at 72.

<sup>66</sup> Beltrametti, *supra* note 41, at 63.

<sup>67</sup> The Sahaba were the followers of the Prophet Muhammad. Abdal-Haqq, *supra* note 38, at 55.

<sup>68</sup> *Id.* at 73.

<sup>69</sup> *Id.* at 72-73.

<sup>70</sup> *Id.* at 71.

<sup>71</sup> *Id.*

<sup>72</sup> Abdal-Haqq, *supra* note 38, at 72.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 71.

<sup>75</sup> Medina is a city in what is now Saudi Arabia. It is the center of the Maliki School and was the home of the Prophet Muhammad for the final ten years of his life. *Id.* at 70-71.

<sup>76</sup> *Id.*



Maliki scholars place those customs above Ijma, Qiyas, and Istislah on the Fiqh hierarchy.<sup>77</sup> The Maliki School is found predominantly throughout northern and western Africa, including parts of northern Egypt.<sup>78</sup>

Hanafi is the final Sunni school of Islamic jurisprudence. It is prevalent throughout the central region of the Middle East, including Jordan and some parts of Egypt.<sup>79</sup> Like Maliki scholars, Hanafi scholars interpret Shari'ah based on local customs and practices.<sup>80</sup> However, unlike Maliki scholars, Hanafi scholars consider custom only after interpretation through Ijma, Qiyas and Istislah fails to provide a suitable resolution.<sup>81</sup> The Hanafi School tends to be more moderate in its interpretation and application of Shari'ah.<sup>82</sup>

Because each of the four schools of Islamic jurisprudence interprets Shari'ah differently, laws in Islamic nations can vary substantially.<sup>83</sup> To appreciate these differences, it is helpful to understand the Islamic schools of jurisprudence and their varying applications of the Fiqh methodologies.

### C. Islamic Law's Effect on IP Protection

After the discussion of Islamic jurisprudence above, this Section briefly explores the effect of Shari'ah on IP laws and the

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<sup>77</sup> Abdal-Haqq, *supra* note 38, at 71.

<sup>78</sup> *Id.* at 70-71; Beltrametti, *supra* note 41, at 62.

<sup>79</sup> *Id.* at 69; Beltrametti, *supra* note 41, at 62.

<sup>80</sup> *Id.* at 70.

<sup>81</sup> *Id.*

<sup>82</sup> See Beltrametti, *supra* note 41, at 63.

<sup>83</sup> For example, family law and criminal law issues are often dependent on the interpretation of Shari'ah employed in a region, as are human rights considerations. Compare Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Law*, 23 PENN ST. INT'L L. REV. 251 (2004) (discussing certain Jordan laws relating to human rights), with Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53 (2002) (comparing differences in treatment of criminals in various Islamic nations); see also Katherine M. Weaver, *Women's Rights and Shari'a Law: A Workable Reality? An Examination of Possible International Human Rights Approaches Through The Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT'L L. 483 (2007) (discussing the plight of woman under the law in some Islamic nations).

requirements under the TRIPs agreement. Because the primary sources of Shari'ah do not explicitly support IP rights, an Islamic lawmaker must rely on Fiqh methodologies to justify IP protection.<sup>84</sup> There is substantial support for protecting personal property rights under Shari'ah; protecting IP rights follows naturally by analogy. Personal property rights derive from both the Sunnah<sup>85</sup> and the Qur'an: "And among His Signs Is . . . the quest that ye (Make for livelihood),"<sup>86</sup> recognizing the acquisition of property through personal undertakings.<sup>87</sup> Whether through research, composition, ingenuity or some combination thereof, IP, like personal property, derives from the efforts of the discoverer. The same justifications for tangible personal property rights therefore extend to intangible IP rights.<sup>88</sup>

Neither of the primary sources (the Qur'an and the Sunnah) limits its discussion of property to tangible property.<sup>89</sup> This fact is important because scholars employ Fiqh reasoning only for clarification when the primary sources are silent or ambiguous.<sup>90</sup> Some scholars interpret the silence of the primary sources on this issue to be a rejection of intangible property rights.<sup>91</sup> However, this interpretation conflicts with the generally accepted practice of

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<sup>84</sup> See generally Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079 (1992) (asserting that Shari'ah is silent on IP rights); Beltrametti, *supra* note 41 (arguing that Shari'ah supports IP rights, however does so through principles of Fiqh interpretation outside the primary sources).

<sup>85</sup> Beltrametti, *supra* note 41, at 65 (quoting Translation of Sahih Muslim, Book 7, The Book of Pilgrimage (Kitab Al-Hajj) ch. 17, No.2803) (asserting that recognition of personal property can be found in the recorded words of Muhammad: "[Y]our property are as sacred and inviolable as the sacredness of this day of yours.").

<sup>86</sup> Qur'an, 30:23.

<sup>87</sup> See Jamar, *supra* note 84, at 1083 ("The act of making unproductive land productive, of using something unused, creates ownership.").

<sup>88</sup> See *id.* at 1086 (arguing that, at worst, Islamic jurisprudence is silent on protecting IP, and IP rights may be specifically supported through the methodologies of Shari'ah interpretation); see generally Beltrametti, *supra* note 41 (exploring the relationship between IP law and Shari'ah).

<sup>89</sup> See Qur'an, 30:23; Jamar, *supra* note 84, at 1083; Beltrametti, *supra* note 41, at 65-66.

<sup>90</sup> Bassiouni & Badr, *supra* note 37, at 140.

<sup>91</sup> See Jamar, *supra* note 84, at 1085.

applying Fiqh to “fill in the gaps” left by the primary sources.<sup>92</sup> Drawing an analogy between tangible and intangible property is consistent with accepted methods of Shari’ah interpretation.<sup>93</sup>

Certain schools of Islamic jurisprudence are more likely to draw such an analogy.<sup>94</sup> Scholars of the Hanbali and Shafii Schools disfavor Qiyas (reasoning by analogy) and instead prefer a literal translation of the primary sources.<sup>95</sup> By contrast, scholars of the Maliki and Hanafi Schools apply Qiyas more liberally and are likely to accept IP as analogous to personal property.<sup>96</sup> Support for IP laws may therefore depend on the prevailing practice of the region, at least insofar as support depends upon interpretation through Qiyas.

Istislah (public interest) further supports protecting IP rights. There are significant benefits, both economic and societal, in providing IP protection.<sup>97</sup> Recognizing IP rights allows innovators to profit from their ingenuity.<sup>98</sup> The financial benefits encourage further innovation and technological advances,<sup>99</sup> in turn improving quality of life.<sup>100</sup>

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<sup>92</sup> *Id.* at 1082.

<sup>93</sup> Note that there is some support in historical Islamic jurisprudence for recognizing intangible property. *Id.* at 1085 (“[O]ne does not amputate the hand of a thief for stealing a book because the thief’s intention is not to steal the book as paper, but the ideas in the book . . . . [T]his particular rule is not Quranic, does not come from the traditions, is not based on consensus, and is not from the qiyas type of reasoning. That is, this rule comes from a commentary on the law written by a prominent jurist.”).

<sup>94</sup> See discussion *supra* Part II.B.2.

<sup>95</sup> See Abdal-Haqq, *supra* note 38, at 69-74.

<sup>96</sup> See *id.*

<sup>97</sup> See generally *Intellectual Capital and Intellectual Property*, KLM, INC. MGMT. CONSULTATION (Jul. 1, 2011), <http://klminc.com/intellectual-capital/intellectual-capital-and-intellectual-property> (discussing the assessment of the value of a business’s intellectual property).

<sup>98</sup> See *id.* (“On average, in successful organizations Brands, Intellectual Property, and other Intangible Assets are two to three times the value of physical assets.”).

<sup>99</sup> *Why Intellectual Property Matters*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/tpp/ipe/why/index.htm> (last visited Oct. 30, 2012).

<sup>100</sup> *Id.*

Some scholars argue that IP protection harms the public interest. “If public interest is drawn too broadly and too powerfully, it can be [used] to remove protections for IP on the grounds that the whole society has need of or could benefit by unrestricted use of the item.”<sup>101</sup> Pharmaceutical patents present the most obvious support for this proposition.

The owner of a pharmaceutical patent has a monopoly over the medication’s production.<sup>102</sup> With complete control over production, the patent owner can manipulate both the price and supply of the medication. Such manipulation can result in high prices and limited supply, which together harm public health.<sup>103</sup> Accordingly, developing countries often advocate against pharmaceutical patent protection.<sup>104</sup> In response, many developed countries have argued that pharmaceutical patents incentivize drug development, improving health care overall.<sup>105</sup>

Furthering the pharmaceutical patent debate’s importance is the WTO’s requirement under the TRIPs agreement that member nations enact laws protecting pharmaceutical patents.<sup>106</sup> If Islamic law

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<sup>101</sup> Jamar, *supra* note 84, at 1090-91.

<sup>102</sup> TRIPs Agreement, *supra* note 18, art. 28 (“A patent shall confer on its owner the following *exclusive* rights . . . to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, [or] selling . . . [the patented] product.”).

<sup>103</sup> For example, the petitioning of Pfizer Inc. to reduce the price of its AIDS treatment drug Diflucan for use in high-risk, poor countries has resulted in about forty-seven percent of those infected receiving treatment. *See* Kate Kelland, *HIV Numbers Hit New High as AIDS Drugs Save Lives*, REUTERS (Nov. 21, 2011, 6:21 AM), <http://www.reuters.com/article/2011/11/21/us-aids-global-unaid-idUSTRE7AK0KX20111121>.

<sup>104</sup> *See* Jonathan Lynn, *Developing Countries Form Intellectual Property Group*, REUTERS (Apr. 26, 2010, 10:11 AM), <http://in.reuters.com/article/2010/04/26/idINIndia-48011820100426> (reporting the dissatisfaction of developing countries with many IP schemes because they “deprive poor people of access to essential medicines”).

<sup>105</sup> *See id.* (noting the assertion by developed countries that “strong [IP] rights are needed to encourage invention”).

<sup>106</sup> TRIPs Agreement, *supra* note 18, art. 70 (requiring laws enacting “patent protection for pharmaceutical and agricultural chemical products commensurate with [the member nation’s] obligations under Article 27”); *but cf.* TRIPs Agreement, *supra* note 18, art. 27 (“Members may exclude from patentability

prohibits pharmaceutical patent protection, Islamic nations would be ineligible for WTO membership.<sup>107</sup> Due to these concerns, WTO members are currently engaged in negotiations concerning pharmaceutical patent protection requirements under the TRIPs agreement.<sup>108</sup> To date, the WTO has not reached a resolution.<sup>109</sup>

Indeed, the implications of this debate on Islamic nations could be severe. If lawmakers employing *Istislah* believe pharmaceutical patent protection harms the public interest, they may refuse to accept the TRIPs agreement<sup>110</sup> and reject WTO membership.<sup>111</sup> This result is surprising given the reputation of moderation enjoyed by Shari'ah scholars willing to engage in *Istislah* in comparison to their unwilling counterparts.<sup>112</sup>

Scholars of the Shafii and Hanbali Schools rarely engage in *Istislah*;<sup>113</sup> in fact, Shafii Scholars outright reject the methodology.<sup>114</sup> In part because of their reluctance to employ *Istislah*, many commentators believe the Shafii and Hanbali Schools to be more traditionalist than the Maliki and Hanafi Schools.<sup>115</sup> However, lawmakers guided by the Shafii and Hanbali Schools who disfavor

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inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.”).

<sup>107</sup> If a nation refuses to implement IP protection, they cannot adopt the TRIPs agreement and are therefore ineligible for WTO membership. See *supra* Part II.A.

<sup>108</sup> The Doha Round, or Doha Development Agenda, is designed to address the concerns of developing WTO members. See *The Doha Round*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#development](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development) (last visited Mar. 22, 2013).

<sup>109</sup> See Paige McClanahan, *Doha Round Trade Talks – Explainer*, GUARDIAN (Sept. 3, 2012, 5:17 AM), <http://www.guardian.co.uk/global-development/2012/sep/03/doha-round-trade-talks-explainer>.

<sup>110</sup> See TRIPs Agreement, *supra* note 18, art. 70 (requiring a WTO member nation to protect pharmaceutical patents).

<sup>111</sup> See discussion *supra* Part II.A.

<sup>112</sup> See Abdal-Haqq, *supra* note 38, at 71; Beltrametti, *supra* note 41, at 63.

<sup>113</sup> Abdal-Haqq, *supra* note 38, at 72-73.

<sup>114</sup> *Id.*

<sup>115</sup> See *id.* at 71; Beltrametti, *supra* note 41, at 63.

interpreting Shari'ah in the public interest will not encounter the pharmaceutical patent debate and will therefore have no compelling argument for rejecting IP rights.

Overall, Fiqh methodology tends to support recognizing IP rights. Nevertheless, Shari'ah law does not compel such recognition.<sup>116</sup> Islamic lawmakers might therefore reject the arguments supporting IP rights, leaving them to determine the wisdom of undertaking IP protection statutorily and without significant guidance from Shari'ah.

#### D. Contracting to Protect IP Rights

Many considerations will influence the decisions of Islamic lawmakers. These influences include international trade, where treaties with foreign nations can significantly benefit an Islamic nation's economy.<sup>117</sup> International treaties represent binding contractual agreements between two or more nations.<sup>118</sup>

Islamic law commands individuals to uphold their obligations under contractual agreements.<sup>119</sup> Likewise, Islamic nations must fulfill their contractual agreements.<sup>120</sup> In fact, the Qur'an explicitly compels practitioners to honor both contractual agreements<sup>121</sup> and treaties.<sup>122</sup> Therefore, if an Islamic nation enters an international agreement to

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<sup>116</sup> See generally Jamar, *supra* note 84 (asserting that Shari'ah is silent on IP law); Beltrametti, *supra* note 41 (arguing that Shari'ah supports IP law, however does so through principles of interpretation outside the primary sources).

<sup>117</sup> See, e.g., Jordan: GDP (Purchase Power Parity), INDEX MUNDI, <http://www.indexmundi.com/g/g.aspx?c=jo&v=65> (last visited Oct. 30, 2012) (stating that Jordan's GDP has more than doubled since 1999, which is the same period Jordan began reforms in IP law, joined the WTO, and entered the US-Jordan FTA).

<sup>118</sup> Frederick L. Kirgis, *Treaties as Binding International Obligation*, AM. SOC'Y OF INT'L LAW (May 1997), <http://www.asil.org/insight9.cfm>.

<sup>119</sup> Qur'an 5:1.

<sup>120</sup> Jamar, *supra* note 84, at 1087.

<sup>121</sup> Qur'an 5:1 ("O ye who believe! Fulfill (all) obligations.").

<sup>122</sup> Qur'an 9:4 ("(But the treaties are) not dissolved with those Pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided any one against you. So fulfill your engagements with them to the end of their term: for Allah loveth the righteous.").

protect IP rights, it is obligated to enact laws in accordance with that treaty's provisions.

Shari'ah interpretation undoubtedly plays a significant role in the legal decisions of any Islamic nation. Lawmakers may differ with respect to Fiqh methodologies and may debate whether Shari'ah supports IP protection.<sup>123</sup> However, there is little, if any, support for prohibiting IP protection.<sup>124</sup> If an Islamic nation contracts to protect IP rights through an international treaty or some other agreement, it must fulfill its contractual obligations.<sup>125</sup>

### III. IP UNDER ISLAMIC LAW: JORDAN, SAUDI ARABIA, AND PRE-REVOLUTION EGYPT

Shari'ah interpretation varies considerably among Islamic jurists.<sup>126</sup> Consequently, Islamic lawmaking can be unpredictable. This section considers the effects of two separate implementations of Shari'ah: the secular approach, taken in the Hashemite Kingdom of Jordan (Jordan), and the traditionalist approach, taken in the Kingdom of Saudi Arabia (Saudi Arabia). Additionally, this section reviews IP law in Egypt under the Mubarak regime and sets the stage for a discussion on the future of IP protection in Egypt.

#### A. IP Protection in the Hashemite Kingdom of Jordan

By enacting new laws and regulations, Jordan has substantially expanded its IP protection over the past fifteen years.<sup>127</sup> As a result, IP rights now find significant protection in the Hashemite kingdom.

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<sup>123</sup> See discussion *supra* Parts II.B-C.

<sup>124</sup> See generally Beltrametti, *supra* note 41; Abdal-Haqq, *supra* note 38; Jamar, *supra* note 84.

<sup>125</sup> See *infra* Part III.C.

<sup>126</sup> See discussion *supra* Part II.B.2.

<sup>127</sup> E.g., Law No. 9 of 2006 (Trade Names), *Al-Jarida Al-Rasmiya*, 2 Feb. 2006 (Jordan); Law No. 9 of 2005 (Amending the Copyright Protection Law), *Al-Jarida Al-Rasmiya*, 21 Feb. 2005 (Jordan); Law No. 28 of 2007 (Amending the Patents Law), *Al-Jarida Al-Rasmiya*, 31 Mar. 2007 (Jordan). Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

Jordan's legal system combines Islamic law with a civil code adopted from and similar to many European countries.<sup>128</sup> The Jordanian Constitution of 1953 establishes "an independent sovereign Arab State" and a "parliamentary [system] with a hereditary monarchy."<sup>129</sup> Although the Constitution adopts Islam as the state religion,<sup>130</sup> Article 14 provides for freedom of religion.<sup>131</sup> However, this provision is limited to the "exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom, unless such exercise is inconsistent with public order or morality."<sup>132</sup> Despite the constitutional declaration of religious tolerance, Jordan prohibits conversion from Islam and provides that the king must be a member of the Islamic faith.<sup>133</sup> In effect, Islam remains a substantial influence on Jordan's legal system.

Given Islam's influence, Jordan's interpretation of Shari'ah is critical to its implementation of IP protection. As discussed previously, Jordanian lawmakers predominantly follow the Hanafi School of Shari'ah interpretation.<sup>134</sup> Hanafi scholars' emphasis on Qiyas (analogy) and Istislah (public interest) provide significant support for IP rights.<sup>135</sup> An array of recently enacted Jordanian laws reflects this support. These laws protect patents,<sup>136</sup> copyrights,<sup>137</sup>

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<sup>128</sup> See Abdal-Haqq, *supra* note 38, at 69.

<sup>129</sup> THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN Jan. 8, 1952, art. 1, [hereinafter CONSTITUTION OF JORDAN], <http://www.wipo.int/wipolex/en/details.jsp?id=9789>.

<sup>130</sup> *Id.* art. 2.

<sup>131</sup> *Id.* art. 14.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* art. 28(e) ("No person shall ascend the Throne unless he is a Moslem . . ."); see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT OF STATE, JULY-DECEMBER, 2010 INTERNATIONAL RELIGIOUS FREEDOM REPORT (Jordan) (Sept. 13, 2011), [http://www.state.gov/j/drl/rls/irf/2010\\_5/168267.htm](http://www.state.gov/j/drl/rls/irf/2010_5/168267.htm) ("[T]he government's application of Sharia infringes upon the religious rights and freedoms laid out in the constitution by prohibiting conversion from Islam and discriminating against religious minorities in some matters.").

<sup>134</sup> See *supra* Part II.B.2.

<sup>135</sup> See *supra* Part II.C.

<sup>136</sup> Law No. 32 of 1999 (Patents), *Al-Jarida Al-Rasmiya*, 20 Sept. 1999 (Jordan); Law No. 28 of 2007 (Amending the Patents Law), *Al-Jarida Al-Rasmiya*, 31 Mar. 2007 (Jordan). Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.



trademarks,<sup>138</sup> trade names,<sup>139</sup> trade secrets,<sup>140</sup> plant varieties,<sup>141</sup> integrated circuits,<sup>142</sup> and industrial designs.<sup>143</sup>

Not surprisingly, Jordan's IP law reformation coincides with its entry into the WTO and its adoption of the TRIPs agreement.<sup>144</sup> Notably, the current patent statute protects pharmaceutical patents after its amendment in 2001.<sup>145</sup> In addition to WTO membership,

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<sup>137</sup> Law No. 22 of 1992 (Protection of Copyright and its Amendments) *Al-Jarida Al-Rasmiya*, 19 Mar. 1992 (Jordan); Law No. 88 of 2003 (Amending the Copyright Protection Law), *Al-Jarida Al-Rasmiya*, 30 Sept. 2003 (Jordan); Law No. 8 of 2005 (Amending the Copyright Protection Law), *Al-Jarida Al-Rasmiya*, 21 Feb. 2005 (Jordan); Law No. 9 of 2005 (Amending the Copyright Protection Law), *Al-Jarida Al-Rasmiya*, 21 Feb. 2005 (Jordan). Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>138</sup> Law No. 33 of 1952 (Trademarks), *Al-Jarida Al-Rasmiya*, 20 May 1952 (Jordan); Law No. 19 of 1953 (Marks of Goods with its Amendments), *Al-Jarida Al-Rasmiya*, 16 Feb. 1953 (Jordan); Law No. 34 of 1999 (Amending the Trademarks Law), *Al-Jarida Al-Rasmiya*, 22 Sept. 1999 (Jordan); Law No. 29 of 2007 (Amending the Trademarks Law), *Al-Jarida Al-Rasmiya*, 31 Mar. 2007 (Jordan); Law No. 15 of 2008 (Amending the Trademarks Law), *Al-Jarida Al-Rasmiya*, 11 Mar. 2008 (Jordan). Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>139</sup> Law No. 9 of 2006 (Trade Names), *Al-Jarida Al-Rasmiya*, 2 Feb. 2006 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>140</sup> Law No. 15 of 2000 (Unfair Competition and Trade Secrets), *Al-Jarida Al-Rasmiya*, 2 May 2000 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>141</sup> Law No. 24 of 2000 (Protection of New Varieties of Plants), *Al-Jarida Al-Rasmiya*, 11 June 2000 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>142</sup> Law No. 10 of 2000 (Protection of Layout-Designs of Integrated Circuits), *Al-Jarida Al-Rasmiya*, 14 Feb 2000 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>143</sup> Law No. 14 of 2000 (Industrial Designs and Models), *Al-Jarida Al-Rasmiya*, 24 Feb. 2000 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>144</sup> *Members and Observers*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last updated Jul. 23, 2008).

<sup>145</sup> Temporary Law No. 71 of 2001 (Amending Patents Law), *Al-Jarida Al-Rasmiya*, 9 Oct. 2001 (Jordan), <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

Jordan signed a bilateral Free Trade Agreement with the United States<sup>146</sup> (US-Jordan FTA) in 2000.<sup>147</sup>

Jordan's recent ingress into the international trade arena coincides with the rise of King Abdullah II (Abdullah) in 1999.<sup>148</sup> Jordan's GDP has more than doubled from sixteen billion in 1999 to an estimated thirty-four billion in 2010, reflecting economic progress as a result of the Abdullah administration's secular approach to international politics and trade.<sup>149</sup> Assuming the Abdullah administration retains power, Jordan's secular approach to IP protection will likely continue.<sup>150</sup>

Jordan's recently enacted legislation reflects lawmakers' belief that Islamic law supports IP rights.<sup>151</sup> Further demonstrating this belief, Jordanian lawmakers have adopted a number of IP-related international treaties,<sup>152</sup> including the WIPO Copyright Treaty,<sup>153</sup> the Berne Convention,<sup>154</sup> and the Paris Convention.<sup>155</sup>

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<sup>146</sup> Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 4, 2000, 41 I.L.M. 63 [hereinafter USJ FTA], [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005607.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005607.asp).

<sup>147</sup> Mohammad El Said, *Jordan*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, 4 INTELLECTUAL PROPERTY, Jordan-1, Jordan-24 (Roger Blanpain & Hendrick Vanhees eds., 2005).

<sup>148</sup> *Id.* at 23.

<sup>149</sup> *Jordan: GDP (Purchase Power Parity)*, INDEX MUNDI, <http://www.indexmundi.com/g/g.aspx?c=jo&v=65> (last visited Oct. 30, 2012).

<sup>150</sup> See generally Ranya Kadri & Ethan Bronner, *Government of Jordan is Dismissed by the King*, N.Y. TIMES, Oct. 18, 2011, at A8, <http://www.nytimes.com/2011/10/18/world/middleeast/king-abdullah-ii-of-jordan-fires-his-government.html> (facing political pressure and accusations of slowing political change, King Abdullah II fired his prime minister and members of his administration).

<sup>151</sup> E.g., Law No. 28 of 2007 (Amending the Patents Law), *Al-Jarida Al-Rasmiya*, 31 Mar. 2007 (Jordan); Law No. 9 of 2005 (Amending the Copyright Protection Law), *Al-Jarida Al-Rasmiya*, 21 Feb. 2005 (Jordan); Law No. 15 of 2008 (Amending the Trademarks Law), *Al-Jarida Al-Rasmiya*, 11 Mar. 2008 (Jordan). Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=JO>.

<sup>152</sup> See *Jordan: IP Laws and Treaties*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/wipolex/en/profile.jsp?code=JO> (last updated Aug. 15, 2011).

The Jordanian government also endorsed IP rights by undertaking the US-Jordan FTA.<sup>156</sup> Article 4.3 of the US-Jordan FTA requires that each state must provide IP protection “no less favorable” than the protection provided to “its own nationals.”<sup>157</sup> In addition, Articles 4.24 and 4.25 encourage the enforcement of IP rights against infringers from either country by awarding monetary damages “sufficiently high to deter future acts of infringement.”<sup>158</sup>

Finally, contemporaneous to the US-Jordan FTA, both the U.S. government and the Jordanian government signed an important *Memorandum of Understanding* (MOU).<sup>159</sup> The MOU begins by stating:

The Government of the United States of America . . . and the Government of the Hashemite Kingdom of Jordan . . . *recognizing the need to promote adequate and effective protection of intellectual property rights*, to provide enhanced intellectual property protection to account for the latest technological developments, and to promote greater efficiency and transparency in the administration of intellectual property systems in order to strengthen the international trading system; *Agree . . .*<sup>160</sup>

This language unequivocally reflects Jordan’s recognition of IP rights. Because the Qur’an commands adherence to treaties and

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<sup>153</sup> WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997), [http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf).

<sup>154</sup> Berne Convention, *supra* note 24.

<sup>155</sup> Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Jul. 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, [http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf).

<sup>156</sup> USJ FTA, *supra* note 146.

<sup>157</sup> *Id.* art. 4.3.

<sup>158</sup> *Id.* art. 4.24-4.25.

<sup>159</sup> Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000 [hereinafter IP MOU], [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset\\_upload\\_file120\\_8462.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file120_8462.pdf).

<sup>160</sup> *Id.* (second emphasis added).

contractual agreements, this agreement compels the Jordan government to protect IP rights.<sup>161</sup>

Given Jordan's secular implementation of Islamic law, it is not surprising to find significant protection for IP rights. The prevalence of Hanafi Scholars has likely contributed to Jordan's secular approach, and there is little reason to expect any change in the near future considering the continued surge in Jordan's economy. As will be discussed, the adoption of a similarly secular approach in post-revolution Egypt would likely benefit its economy and its citizens.

#### B. IP Protection in the Kingdom of Saudi Arabia

Unlike Jordan, many commentators view Saudi Arabia as a fundamentalist government because of its substantial lack of progress with respect to human rights.<sup>162</sup> According to the Saudi Basic Law, "The state protects human rights *in accordance with the Islamic Shari'ah*."<sup>163</sup> Consequently, one might expect the fundamentalist Saudi regime to be hesitant to implement IP protection. Nevertheless, Saudi Arabia has passed numerous IP statutes in the last decade.<sup>164</sup> Although Saudi Arabia has failed to progress significantly in the area

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<sup>161</sup> See discussion *supra* Part II.C.

<sup>162</sup> See, e.g., *Saudi Arabia Human Rights*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/countries/middle-east-and-north-africa/saudi-arabia?id=1011230> (last visited Oct. 30, 2012); BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, JULY-DECEMBER, 2010 INTERNATIONAL RELIGIOUS FREEDOM REPORT (Saudi Arabia) (Sept. 13, 2011) [hereinafter SA RF REPORT 2011], [http://www.state.gov/j/drl/rls/irf/2010\\_5/168275.htm](http://www.state.gov/j/drl/rls/irf/2010_5/168275.htm).

<sup>163</sup> BASIC SYSTEM, Mar. 5, 1992, art. 26 (Saudi Arabia) [hereinafter SA BASIC LAW] (emphasis added), <http://www.wipo.int/wipolex/en/details.jsp?id=7973>. Because the Saudi Constitution is literally the Qur'an and Sunnah, the Saudi Basic Law acts as would a typical national constitution. *Id.* art. 1.

<sup>164</sup> See Law of Trade Names, *Umm al-Qura*, 20 Nov. 1999 (Saudi Arabia); Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs, *Umm al-Qura*, 16 July 2004 (Saudi Arabia); Copyright Law, *Umm al-Qura*, 30 Aug. 2003 (Saudi Arabia); Law of Trademarks, *Umm al-Qura*, 7 Aug 2002 (Saudi Arabia) [hereinafter SA IP Laws]. Each of these laws can be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=SA>.

of human rights,<sup>165</sup> the same is not true of its progress in international trade.

Today, Saudi Arabia remains as one of only three Middle Eastern nations that uses Shari'ah as the sole basis for its legal system.<sup>166</sup> Article 1 of the Saudi Basic Law states: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's book and the Sunnah of His Prophet . . . are its constitution."<sup>167</sup> The Saudi Basic Law also states that the "[g]overnment in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition" and that the "Government . . . is based on the premise of justice, consultation, and equality in accordance with the Islamic Shari'ah."<sup>168</sup> These examples, among others,<sup>169</sup> demonstrate the emphasis on Islamic law found in Saudi Arabia's Basic Law. Accordingly, Islamic law is paramount to lawmaking in Saudi Arabia.

The Fiqh methodology employed by Hanbali scholars provides the basis for Saudi law.<sup>170</sup> Hanbali scholars place little emphasis on Istislah (public interest), and they undertake Qiyas (reasoning by analogy) only as a last resort when guidance cannot be found through the literal words of the primary sources.<sup>171</sup> As a result, Saudi lawmakers will most likely avoid significant use of Fiqh methodologies; instead, they will construct laws using the traditionalist view of Shari'ah interpretation.<sup>172</sup>

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<sup>165</sup> See, e.g., AMNESTY INT'L, *supra* note 162; SA RF REPORT 2011, *supra* note 162.

<sup>166</sup> Abdal-Haqq, *supra* note 38, at 68. The other two nations that use Shari'ah law as the sole basis for their legal system are Sudan and Iran. *Id.*

<sup>167</sup> SA BASIC LAW, *supra* note 163, art. 1.

<sup>168</sup> *Id.* art. 7-8.

<sup>169</sup> For example, showing the government's commitment to preserving Islamic ideals in its citizens, children "shall be brought up on the basis of the Islamic faith." *Id.* art. 9; see also *id.* art. 14 ("[E]ducation will aim at instilling the Islamic faith in the younger generation.").

<sup>170</sup> Abdal-Haqq, *supra* note 38, at 72.

<sup>171</sup> See *id.* at 72-73.

<sup>172</sup> The traditionalist view of Shari'ah interpretation looks less to Fiqh interpretation methodologies and more to the literal language of the Qur'an and Sunnah for guidance. See *supra* Part II.B.1.

Despite this traditionalist view, Saudi lawmakers have passed several laws protecting IP rights.<sup>173</sup> These laws indicate their belief that IP rights are consistent with Shari'ah without significant interpretation through Fiqh. Saudi laws protect copyrights,<sup>174</sup> trademarks,<sup>175</sup> trade names,<sup>176</sup> patents,<sup>177</sup> integrated circuits,<sup>178</sup> industrial designs,<sup>179</sup> and plant varieties.<sup>180</sup> Like Jordan, Saudi Arabia passed the majority of these laws shortly before joining the WTO in December 2005.<sup>181</sup> Saudi Arabia's willingness to adopt TRIPs, given its traditionalist reputation, indicates that Islamic law supports IP rights irrespective of the jurist's method of Shari'ah interpretation.

Notwithstanding Saudi Arabia's traditionalist reputation and its lack of progress on human rights issues,<sup>182</sup> lawmakers have provided substantial IP protection.<sup>183</sup> Although Saudi Arabia may not agree with Jordan's secular approach to Shari'ah,<sup>184</sup> both nations agree that Islamic law should protect IP rights.

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<sup>173</sup> See SA IP Laws, *supra* note 164.

<sup>174</sup> Copyright Law, *Umm al-Qura*, 30 Aug. 2003 (Saudi Arabia), <http://www.wipo.int/wipolex/en/details.jsp?id=3593>.

<sup>175</sup> Law of Trademarks, *Umm al-Qura*, 7 Aug 2002 (Saudi Arabia), <http://www.wipo.int/wipolex/en/details.jsp?id=3595>.

<sup>176</sup> Law of Trade Names, *Umm al-Qura*, 20 Nov. 1999 (Saudi Arabia), <http://www.wipo.int/wipolex/en/details.jsp?id=7890>.

<sup>177</sup> Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs, *Umm al-Qura*, 16 July 2004 (Saudi Arabia), <http://www.wipo.int/wipolex/en/details.jsp?id=3596>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *Accession Status: Saudi Arabia*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_arabie\\_saoudite\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm) (last visited Oct. 30, 2012).

<sup>182</sup> See, e.g., AMNESTY INT'L, *supra* note 162; SA RF REPORT 2011, *supra* note 162.

<sup>183</sup> See SA IP Laws, *supra* note 164.

<sup>184</sup> Compare Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Law*, 23 PENN ST. INT'L L. REV. 251 (2004) (discussing certain Jordan laws relating to human rights), with Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53 (2002) (considering certain Saudi laws and human rights implications); see also Katherine M. Weaver, *Women's Rights and Shari'a Law: A Workable Reality? An Examination of*

### C. IP Protection in Pre-Revolution Egypt

Since the Camp David accords and the peace treaty between Egypt and Israel in 1978,<sup>185</sup> Egypt has shown stability in an otherwise volatile region.<sup>186</sup> Moreover, Egypt has been a leader in the secular Islamic movement.<sup>187</sup> As the “Arab world’s first secular dictatorship,”<sup>188</sup> Egypt represented a significant shift toward tolerance and away from the traditionalist views many believe to be the primary source of Middle Eastern instability.<sup>189</sup> For example, Egypt was one of the first Middle Eastern members of the WTO<sup>190</sup> and has been a leading advocate for developing nations in the Doha Round of WTO negotiations.<sup>191</sup> With the departure of President Mubarak, Egypt’s role as a stable leader in the Middle East is now uncertain.

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*Possible International Human Rights Approaches Through The Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT’L L. 483 (2007).

<sup>185</sup> In September 1978, U.S. President Jimmy Carter invited Israeli Prime Minister Begin and Egyptian President Anwar al-Sadat to Camp David for secret negotiations. As a result, Egypt and Israel have remained at peace for the last three decades. See *Camp David Accords*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/91061/Camp-David-Accords> (last visited Oct. 30, 2012).

<sup>186</sup> See Jane Friedman, *Hosni Mubarak Brought Stability to Egypt, At a Price*, VOICE OF AM., <http://www.voanews.com/english/news/middle-east/Mubarak-Egyptys-Controversial-Former-Leader-115924004.html> (last updated Feb. 11, 2011) (reflecting on the Mubarak presidency and the stability of the Egypt-Israel peace treaty over the last three decades).

<sup>187</sup> See Kirkpatrick, *supra* note 1; see also Jamar, *supra* note 84, at 1080 (noting that Egypt’s IP laws have been adopted by many other Islamic nations).

<sup>188</sup> Kirkpatrick, *supra* note 1.

<sup>189</sup> See Mary Kate Cary, *Democracy Must be the Future of the Middle East*, US NEWS, Mar. 2, 2011, <http://www.usnews.com/opinion/articles/2011/03/02/democracy-must-be-the-future-of-the-middle-east> (noting that “violent extremism” is a “source[] of tension in middle eastern nations”); *Terrorism, Concerns about Extremism & Foreign Policy*, PEW RESEARCH CTR. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-6-terrorism-concerns-about-extremism-foreign-policy/> (discussing concerns about violent extremism in the Muslim American community).

<sup>190</sup> See *Egypt – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/egypt\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/egypt_e.htm) (last visited Oct. 30, 2012).

<sup>191</sup> See Lynn, *supra* note 104 (noting that Egypt is “coordinator” of developing countries’ intellectual property group).

Prior to the revolution, the Egyptian legal system combined Islamic law with a European style civil code.<sup>192</sup> Like Jordan's Constitution and Saudi Arabia's Basic Law, the Egyptian Constitution<sup>193</sup> established "Islam [as] the Religion of the State"<sup>194</sup> and declared "the principal source of legislation [to be] Islamic Jurisprudence."<sup>195</sup> Significantly, the Egyptian Constitution made "[a]ll citizens [] equal before the law"<sup>196</sup> with respect to "sex, ethnic origin, language, religion or creed"<sup>197</sup> and "guarantee[d] the freedom of belief and the freedom of practicing religious rights."<sup>198</sup> Such provisions are unusual for Islamic law constitutions<sup>199</sup> and reflect the secularist governing approach adopted in Egypt.

Shari'ah interpretation in Egypt derives primarily from Shafii scholars, although Hanafi and Maliki scholars have some influence.<sup>200</sup> Shafii scholars reject Istislah (public interest) and consider Qiyas (analogy) to be "the farthest legitimate extent" of Shari'ah interpretation permissible.<sup>201</sup> However, the more moderate Hanafi and Maliki Schools permit consideration of Istislah, and Egypt's legislative actions reflect this influence.<sup>202</sup>

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<sup>192</sup> Hossam A. El Saghir, *Egypt*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, 3 INTELLECTUAL PROPERTY Egypt-1, Egypt-16 (Roger Blanpain & Hendrick Vanhees eds., 2009).

<sup>193</sup> Note that, throughout this section, the Egyptian Constitution, statutes, international treaties, and other agreements created under the former Egyptian government will be referenced. Although it will not be specified in each instance, any reference to governmental documents in this section should be understood as relating to the former Egyptian government, and not to the post-revolution government.

<sup>194</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, art. 2 [hereinafter CONSTITUTION OF EGYPT], [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=189854](http://www.wipo.int/wipolex/en/text.jsp?file_id=189854).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* art. 40.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* art. 46.

<sup>199</sup> See *supra* Parts III.A-B.

<sup>200</sup> See Abdal-Haqq, *supra* note 38, at 70-73.

<sup>201</sup> *Id.* at 72.

<sup>202</sup> E.g., CONSTITUTION OF EGYPT, *supra* note 194, art. 2 (providing multiple clauses denoting considerations of public interest as well as considerations



Egypt began its IP protection scheme near the end of the 1800s, earlier than most nations in the region.<sup>203</sup> More recently, Egypt enacted a comprehensive IP statute that protects copyrights, trademarks, trade names, trade secrets, patents, integrated circuits, and plant varieties.<sup>204</sup> It is significant that Egypt had IP laws in place before any international agreement so required.<sup>205</sup> Egyptian lawmakers chose to protect IP independent of any contractual obligation, thereby showing that they “believed intellectual property to be compatible with Shari’ah.”<sup>206</sup>

Furthermore, Egypt is among the first Islamic nations to have joined the WTO<sup>207</sup> and has adopted several IP related international treaties.<sup>208</sup> Egypt’s adherence to TRIPs is especially significant given that Egyptian scholars are willing to engage in Istislah (public interest).<sup>209</sup> As discussed previously, the TRIPs agreement requires protecting pharmaceutical patents,<sup>210</sup> and some scholars argue that this protection is harmful to the public interest.<sup>211</sup> In effect, Egypt has

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of the rights and privileges of the individual and public order and morality); Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 3 Jun. 2002 (Egypt), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126540](http://www.wipo.int/wipolex/en/text.jsp?file_id=126540) (noting the interests of public order and morality).

<sup>203</sup> Heba A. Raslan, *Shari’a and the Protection of Intellectual Property – The Example of Egypt*, 47 IDEA 497, 498 (2007).

<sup>204</sup> Law No. 82 of 2002 (Law on the Protection of Intellectual Property Rights), *Al-Jarida Al-Rasmiyya*, 3 Jun. 2002 (Egypt), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126540](http://www.wipo.int/wipolex/en/text.jsp?file_id=126540). The statute consists of four books. Book one covers patents and integrated circuits; book two covers trademarks, trade names and trade secrets; book three covers copyrights; and book four covers plant varieties.

<sup>205</sup> Raslan, *supra* note 203, at 498.

<sup>206</sup> Chad M. Cullen, *Can TRIPs Live in Harmony with Islamic Law? An Investigation of the Relationship Between Intellectual Property and Islamic Law*, 14 SMU SCI. & TECH. L. REV. 45, 62 (2010).

<sup>207</sup> *Members and Observers*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last updated Jul. 23, 2008).

<sup>208</sup> For a list of Egypt’s IP related multinational treaty agreements, see *Egypt: IP Laws and Treaties*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/wipolex/en/profile.jsp?code=EG> (last updated July 2, 2012).

<sup>209</sup> Egyptian scholars are willing to engage in Istislah because of the influence of the Hanafi and Maliki Schools. See Abdal-Haqq, *supra* note 38, at 70-73.

<sup>210</sup> See *supra* Part II.C.

<sup>211</sup> See *supra* Part II.C.

rejected this argument, and its role as a leading nation in the Middle East makes this rejection quite influential.

In fact, Egypt had been a leading advocate on behalf of developing nations in the Doha Round of WTO negotiations,<sup>212</sup> where pharmaceutical patent protection is a principle concern.<sup>213</sup> Although Egypt disfavored pharmaceutical patent protection, lawmakers did not assert that such protection conflicted with Islamic law. Instead, Egypt enacted complying legislation and thereafter petitioned the WTO for a change in TRIPs requirements.<sup>214</sup> In essence, Egypt asserted that the benefits of IP protection outweigh the harm that might result to public health.<sup>215</sup> Through these actions, Egyptian lawmakers demonstrated their belief that *Istislah* does not forbid IP protection.

Like the Islamic nations considered previously, Egypt has asserted harmonization of IP protection and *Shari'ah* through its legal and political actions. Finding neither convincing theoretical support against IP rights nor a real world example of an Islamic nation rejecting them, Islamic law appears to support IP protection.

#### IV. THE FUTURE OF EGYPT

With new government comes change. Indeed, change is precisely what Egyptian citizens want, and rightly so.<sup>216</sup> However, not all change is for the better. This section discusses the potential changes coming to Egypt through a new democratically elected

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<sup>212</sup> Lynn, *supra* note 104.

<sup>213</sup> See *The Doha Round*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#development](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development) (last visited Oct. 30, 2012).

<sup>214</sup> See Lynn, *supra* note 104.

<sup>215</sup> See discussion *supra* Part II.C.

<sup>216</sup> The Mubarak regime's human rights violations against the Egyptian people are well documented. See Emily Loftis, *Mubarak's Human Rights Legacy*, MOTHER JONES (Feb. 1, 2011, 7:00 AM), <http://motherjones.com/mojo/2011/01/mubaraks-human-rights-record> (commenting on accusations of torture, police violence, and other human rights violations in Egypt); see also *Egypt: Impunity for Torture Fuels Days of Rage*, HUM. RTS. WATCH (Jan. 31, 2011), <http://www.hrw.org/news/2011/01/31/egypt-impunity-torture-fuels-days-rage> (asserting that human rights violations by the Mubarak administration fueled the revolution).

government and how different applications of Islamic law might affect Egyptian IP protection and international trade relations.

The traditional argument against IP rights begins by asserting that “the concept of ownership in Shari’a is confined to tangible objects only.”<sup>217</sup> This assertion is based on the idea that, because the primary sources (Qur’an and Sunnah) do not mention intangible property, Shari’ah does not support its recognition.<sup>218</sup> Such a construction essentially rejects Fiqh interpretation methodologies entirely.<sup>219</sup> Even the most traditionalist Shari’ah scholars rarely accept this extreme position.<sup>220</sup>

In the past, Egyptian lawmakers have demonstrated a willingness to engage in Fiqh primarily under the Shafii School of interpretation, with some influence from the Hanafi and Maliki Schools.<sup>221</sup> Because the same scholars continue to predominate in Egypt, there is no reason to expect any shift in the theology of Egyptian lawmakers causing the rejection of IP rights.

Although Shafii scholars are more traditional in their application of Fiqh reasoning, they have always accepted Qiyas (reasoning by analogy) as a legitimate interpretation method.<sup>222</sup> There is a clear analogy to be drawn between tangible and intangible property, especially because the Qur’an justifies property accumulation through individual undertaking.<sup>223</sup> Like tangible property, IP arises from such undertakings, making IP rights equally justified.

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<sup>217</sup> Raslan, *supra* note 203, at 502 (quoting Mufti Taki Usmani, *Copyright According to Shariah*, ALBALAGH, <http://www.albalagh.net/qa/copyright.shtml> (last visited Oct. 30, 2012)).

<sup>218</sup> See *supra* Part II.C.

<sup>219</sup> See *supra* Part II.C.

<sup>220</sup> All schools of Shari’ah interpretation accept the fundamental Fiqh methodologies of Ijma (consensus) and Qiyas (analogy). Abdal-Haqq, *supra* note 38, at 73.

<sup>221</sup> See *supra* Part III.C.

<sup>222</sup> See Abdal-Haqq, *supra* note 38, at 72.

<sup>223</sup> The Qur’an recognizes accumulation of wealth and property through the efforts of the individual. Qur’an, 30:23 (“And among His Signs Is . . . the quest that ye (Make for livelihood).”).

A second argument against IP rights arises from the Shari'ah prohibition of gains disproportionate (and therefore dishonest) to the property holder's efforts.<sup>224</sup> Some scholars argue that although IP rights arise from personal efforts, they provide disproportionate wealth to undeserving persons.<sup>225</sup>

This argument ties in with another similar argument against IP rights: Shari'ah prohibits usury, or interest.<sup>226</sup> Some Islamic scholars view interest as unwarranted financial gain and argue that it is therefore prohibited.<sup>227</sup> These prohibitions derive from the main justification of property under Islamic law—that individuals should accumulate in wealth and property an amount proportionate to their efforts.<sup>228</sup>

Some traditionalist scholars therefore argue that Islamic law prohibits IP protection because the owners of IP rights often receive royalties far greater than their investment.<sup>229</sup> Additionally, these scholars argue that licensing fees are comparable to interest, and represent an unjustified markup, or usury.<sup>230</sup>

While such arguments may have found support in historical Islamic interpretation, they have proved far less useful in modern Islamic society.<sup>231</sup> An absolute ban on interest would render banking

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<sup>224</sup> Qur'an 104:1-2 ("Woe to every (kind of) scandal-monger and backbiter, who pileth up wealth and layeth it by.").

<sup>225</sup> See Beltrametti, *supra* note 41, at 75; Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 IDEA 151, 167 (2003).

<sup>226</sup> Qur'an 2:275 ("But Allah hath permitted trade and forbidden usury."); Qur'an 2:278 ("O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers.").

<sup>227</sup> See Beltrametti, *supra* note 41, at 75-76; Khoury, *supra* note 225, at 190-91.

<sup>228</sup> See Beltrametti, *supra* note 41, at 75-76; Jamar, *supra* note 84, at 1083; Khoury, *supra* note 225, at 168.

<sup>229</sup> See Beltrametti, *supra* note 41, at 75-76; Khoury, *supra* note 225, at 189.

<sup>230</sup> See Beltrametti, *supra* note 41, at 76; Khoury, *supra* note 225, at 191.

<sup>231</sup> See Beltrametti, *supra* note 41, at 86; see also Khoury, *supra* note 225, at 191 (asserting that Shari'ah principles supporting IP protection outweigh those rejecting it); Raslan, *supra* note 203, at 557 (asserting that Shari'ah principles and its main objectives support IP rights).

impracticable, and, as such, the Shari'ah prohibition of usury is normally limited to excessive interest.<sup>232</sup> Furthermore, the disproportionate gains argument represents a subjective determination, and rejecting IP rights entirely on such a basis is improbable at best. A more likely solution would be statutory limitations on royalties.

Today, neither moderate nor traditionalist Shari'ah scholars find much support for the outright rejection of IP rights.<sup>233</sup> The realities of modern society encourage IP protection.<sup>234</sup> The number of Islamic nations who have enacted IP protection legislation reflects this reality.<sup>235</sup> There is little room remaining in modern Islamic society for the type of literal interpretation that would preclude IP rights under Shari'ah.

Whatever the political nature of the new Egyptian government, lawmakers will most likely continue to protect IP rights. Egypt has historically been among the leaders in the secular Islamic movement,<sup>236</sup> which indicates the progressive mindset of many Egyptian citizens. With a populace that supports continued advancement in the global marketplace, an Islamic traditionalist government rejecting IP rights would be incompatible.

Moreover, Egypt will continue to protect IP rights because it must adhere to the international agreements of the previous government. Islamic law commands practitioners to fulfill their contractual obligations.<sup>237</sup> Even if the new Egyptian government

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<sup>232</sup> See Beltrametti, *supra* note 41, at 76; Khoury, *supra* note 225, at 190; Raslan, *supra* note 203, at 531-32.

<sup>233</sup> See discussion *supra* Part III.

<sup>234</sup> It is generally accepted that IP protection provides incentive for innovation and is beneficial to a nation's economy. See *supra* Part II.C.

<sup>235</sup> Membership in the WTO requires ratification of TRIPs and IP protection laws; the current Islamic members of the WTO include Bangladesh, Egypt, The Gambia, Ghana, Jordan, Mauritania, Morocco, Nigeria, Oman, and Saudi Arabia. *Members and Observers*, WORLD TRADE ORG., [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last updated Aug. 24, 2012).

<sup>236</sup> See Kirkpatrick, *supra* note 1; see also Jamar, *supra* note 84, at 1080 (noting Egypt's IP laws have been adopted by many other Islamic nations).

<sup>237</sup> See discussion *supra* Part II.C.

considered disregarding the obligations of its predecessor regime, Islamic law compels it otherwise.<sup>238</sup> International scholars and businesspersons can therefore rest assured that Egyptian IP protection will persevere.

Egypt's future as a stable, secular leader in the Middle East may be in doubt,<sup>239</sup> but the revolution's effect on IP rights and protections should be minimal. The Egyptian people seek progress in human rights and quality of life, and IP rights provide a vehicle for that progress.

### CONCLUSION

Historically, IP rights have contributed substantially to economic advancement.<sup>240</sup> The United States—the world's predominant economic power<sup>241</sup>—has enjoyed the benefits of IP protection since ratifying its Constitution in 1787.<sup>242</sup> After implementing similar policies, other nations have experienced similar

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<sup>238</sup> See *supra* Part II.C; see also Qur'an 5:1 (requiring fulfillment of contractual obligations).

<sup>239</sup> For a discussion of the current political instability in Egypt, see *Egypt News – Revolution and Aftermath Chronology*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt/index.html> (last updated Mar. 20, 2013).

<sup>240</sup> See generally Jeong-Yeon Lee & Edwin Mansfield, *Intellectual Property Protection and U.S. Foreign Direct Investment*, 78 REV. OF ECON. & STAT. 181 (1996) (analyzing the role a nation's IP protection plays in encouraging investment from U.S. businesses, thereby boosting economic growth).

<sup>241</sup> The International Monetary Fund ranks the U.S. nominal GDP in 2011 (the most recent statistics available) at approximately 15 trillion, more than double China's 7.3 trillion as the world's second largest economy. Data from the World Bank and Central Intelligence Agency show similar results. *List of Countries by GDP (Nominal)*, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_GDP\\_%28nominal%29](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_%28nominal%29) (last modified Oct. 29, 2012).

<sup>242</sup> The U.S. Constitution specifically provides for patent and copyright protection. U.S. CONST. art. 1, § 8, cl. 8. The U.S. legislature has protected other forms of IP, such as trademarks, statutorily. *E.g.*, Lanham Act, 15 U.S.C. §§ 1051-1141 (1946).

economic gains.<sup>243</sup> The impact of innovation on economic prosperity is undisputable, and IP protection encourages this innovation.

The same economic interests inspire Islamic nations like Egypt to protect IP rights. Shari'ah principles have progressed over time, and few Islamic scholars now advocate against IP rights. Perhaps the words of Steven D. Jamar<sup>244</sup> reflect this progression best:

Regardless of whether Islamic law moves in the direction of modern reformist theoreticians or toward more fundamentalist traditionalists, there is no compelling reason to anticipate dramatic enhancement or reduction in the protections of intellectual property based solely on the desire to make them fit within the shari'a. Other political concerns may result in sweeping changes or a particular zealot's view of the proper interpretation of the Quran and the shari'a could result in dramatic changes, but such changes are not compelled by either traditional or modern understanding of the shari'a.<sup>245</sup>

Without a prohibition on IP rights arising from Islam, Egypt can continue IP protection and ride its revolution to economic prosperity and social equality, a vision that the Egyptian people yearn to experience.

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<sup>243</sup> See COMM'N ON INTELL. PROP. RTS., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (2002), [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf).

<sup>244</sup> Professor of Law and Associate Director of the Institute of Intellectual Property and Social Justice, Howard University School of Law.

<sup>245</sup> Jamar, *supra* note 84, at 1106.

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**“THE LIVING ARE GETTING RARER”:  
THE CAUSES AND CONSEQUENCES OF  
THE INTERNATIONAL TRADE IN  
WHITE RHINOCEROS HORNS UNDER  
THE CONVENTION ON  
INTERNATIONAL TRADE IN  
ENDANGERED SPECIES**

*Alisha Falberg\**

INTRODUCTION

It is early Saturday morning, August 20, 2011, on the Aquila Private Game Reserve in South Africa.<sup>1</sup> Three rhinoceros are grazing on the plain. Suddenly, a dart flashes. One of the rhinoceros is hit, then another, then the third. They all go down. The poachers approach with their chainsaws.

One of the rhinoceros is named Absa.<sup>2</sup> Absa is an eleven-year-old male white rhino who acquired his name from a donor to the reserve.<sup>3</sup> The poachers want Absa and the other rhinos for their

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\* J.D. candidate, 2013, Dickinson School of Law, Pennsylvania State University. I would like to thank all those who were involved in the editing process for their help and advice. I hope that this comment inspires readers to take action to help save not only the white rhinoceros, but all endangered species.

<sup>1</sup> Rebecca Meredith, *Absa the Injured Rhino May Not Survive in the Wild*, CAPE TIMES (S. Afr.), Aug. 25, 2011, at 6.

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*



horns, and after they are through butchering the other male rhino, they move to Absa. The poachers use their chainsaw to saw off one horn and part of his second.<sup>4</sup> However, in the process reserve staff notice the scene and the poachers flee leaving the other male dead, Absa injured, and the third, a female, unharmed.<sup>5</sup>

Absa, whose leg may have been broken from being tranquilized, was given immediate veterinary care.<sup>6</sup> His potential leg fracture troubled the veterinarians,<sup>7</sup> and he struggled with hypothermia and dehydration.<sup>8</sup> Unfortunately, he died five days later—a result of injuries sustained during the poaching.<sup>9</sup>

Even though Absa was unable to recover, veterinarians questioned whether he would have survived in the wild had they been able to treat his wounds.<sup>10</sup> Without their horns, rhinoceros are more susceptible to attacks by predators, and other rhinoceros often ostracize hornless rhinos like Absa.<sup>11</sup> Thus, the poachers' inhumane

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<sup>4</sup> Murray Williams, *Rhino Dies of Injuries After Poaching Attack*, CAPE ARGUS (S. Afr.), Aug. 25, 2011, at 6, <http://www.iol.co.za/capeargus/rhino-dies-of-injuries-after-poaching-attack-1.1124896#.UUeHb4VpfSk>.

<sup>5</sup> See *id.*

<sup>6</sup> See Meredith, *supra* note 1.

<sup>7</sup> See *id.* (explaining that if Absa's leg was broken, the veterinarians would have had to put Absa down because a rhinoceros leg cannot be healed once it has been broken).

<sup>8</sup> See Williams, *supra* note 4.

<sup>9</sup> See *id.*

<sup>10</sup> See Meredith, *supra* note 1.

<sup>11</sup> See *id.*; see also *Southern White Rhinoceros*, PHILA. ZOO, <http://www.philadelphiazoo.org/zoo/Meet-Our-Animals/Mammals/Hoofed/Southern-white-rhinoceros.htm> (last visited Apr. 4, 2013); *Southern White Rhinoceros*, ZOOS S. AUSTL., <http://www.zoossa.com.au/monarto-zoo/animals-exhibts/animals?species=Southern%20White%20Rhinoceros> (last updated July 28, 2011) (explaining the significance and complexity of the social behavior and relationships of the white rhinoceros. The white rhino has a more complex social relationship than other rhinoceros. It lives in herds or "ranges," of up to 14. It depends on its herd to defend against threats. "Ranges" generally consist of maturing males and females. Once a male rhino ages it becomes more solitary, but the "ranges" often overlap. This overlap means that the rhinos often encounter one another and, when they do meet, they greet each other by touching nose to nose and sometimes by rubbing their horns together. Dominant adult males will guard their ranges from other males but allow overlap of ranges with subordinate males. Males only breed once they have achieved dominant status. In order to achieve this status, they must

treatment of Absa likely would have destroyed his well-being even if he survived the attack.

The tragic story of Absa the rhinoceros is regularly repeated in South African wildlife reserves.<sup>12</sup> The poachers who cut off Absa's horn made off with an estimated \$554,020.00 United States Dollars (USD)<sup>13</sup> worth of rhinoceros horn. This cruelty is motivated chiefly by money and leaves behind devastation for this beautiful and endangered species.<sup>14</sup>

Because the white rhino is endangered, trade of its horns is strictly regulated.<sup>15</sup> Unfortunately, the current regulations have been ineffective at limiting the activities of poachers, like those who attacked and ultimately killed Absa. Why is this butchery happening? The main reason is the large demand for rhinoceros horns on the Asian black market,<sup>16</sup> where the horns are used in traditional medicines and are believed to cure cancer.<sup>17</sup> The high demand for these horns drives up prices and fuels the illegal trade,<sup>18</sup> which in turn leads to rhinoceros poaching in South Africa, where white rhinoceros are predominately found and the largest supply is located.<sup>19</sup> The high

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claim a territory and defend it with their horns and other territorial markers and noises, like snorts and deep roars. Clashing of horns is also used in mating).

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> See Meredith, *supra* note 1 (stating that the horns the poachers took from Absa and the other male were worth R4 million—four million South African Rand). Using the conversion rate on Nov. 30, 2012, four million South African Rand is equivalent to 350,000 USD. *Currency Converter*, OANDA, <http://www.oanda.com/currency/converter/> (last visited Nov. 30, 2012).

<sup>14</sup> Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora apps. I-II, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.C. I-14537 (2011) [hereinafter CITES], <http://www.cites.org/> (listing rhinocerotidae ceratotherium simum, the white rhinoceros, as an endangered species).

<sup>15</sup> *Id.* arts. 3-4; see also *infra* Part III.A.

<sup>16</sup> E.g., Richard Slater-Jones, *The Economics of Rhino Poaching: Tipping Point*, FIN. MAIL (S. Afr.), Sept. 9, 2011; see also *infra* Part II.C.

<sup>17</sup> See Slater-Jones, *supra* note 16.

<sup>18</sup> See *id.*

<sup>19</sup> See Press Release, S. Afr. Dep't of Env'tl. Affairs, Statement By Minister Edna Molewa on the Ongoing Scourge of Rhino Poaching (Aug. 29, 2011) [hereinafter Molewa Press Release on Poaching Scourge], <http://allafrica.com/stories/201108300180.html> (stating that South Africa has the highest number of white rhinoceros on the continent); see also *infra* Part II.C; Marianne Merten, *Proposed*

demand for and comparatively low supply of white rhinoceros horns creates a huge incentive for poachers. Some reports assert that rhinoceros horns are worth more per kilo than diamonds, gold, heroin, or cocaine.<sup>20</sup>

This comment will explain the legal causes and consequences of the poaching and trading of this majestic, endangered species and will convey the urgency of the need to put an end to this practice. Part II will discuss, through examples, what is happening to white rhinoceros like Absa.<sup>21</sup> Part II will also discuss the primary countries involved in the trade and identify the primary reasons for the traffic of white rhinoceros horns.<sup>22</sup> Parts III and IV will identify and examine the laws, treaties, and actions being taken in the nations that export and import rhinoceros horns<sup>23</sup> and will show that the poaching of rhinos like Absa continues despite the prohibitory and regulatory laws and treaties.<sup>24</sup> Additionally, Part IV will explore the reasons why black market trafficking continues, such as the lack of enforcement of existing laws and the bribery of park rangers and game preserve owners.<sup>25</sup> Part IV will also discuss current attempts by the importing and exporting countries to resolve current problems and to establish what needs to be done to prevent future poaching.<sup>26</sup> Finally, this Comment will conclude by demonstrating how individuals and other organizations are helping the white rhinoceros.<sup>27</sup>

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*Freeze on Rhino-Hunting Permits to Stop Abuse*, CAPE TIMES (S. Afr.), Aug. 30, 2011, at 6 (stating that ninety-three percent of Africa's white rhinoceros population reside in South Africa); *Traditional Medicine*, SUN. OBSERVER (Sri Lanka), Oct. 2, 2011, <http://www.sundayobserver.lk/2011/10/02/spe01.asp> ("South Africa is home to the majority of the world's rhinos.").

<sup>20</sup> E.g., *UK Secures International Agreement to Combat Illegal Rhino Trade*, EUR. UNION NEWS, Aug. 26, 2011, <http://www.defra.gov.uk/news/2011/08/20/rhinohorn/>.

<sup>21</sup> See *infra* Part II.A.

<sup>22</sup> See *infra* Part II.B-C.

<sup>23</sup> See *infra* Part III-IV.B.

<sup>24</sup> See *infra* Part IV.C-D.

<sup>25</sup> See *infra* Part IV.E.

<sup>26</sup> See *infra* Part IV.F.

<sup>27</sup> See *infra* CONCLUSION.

## II. BACKGROUND

Absa's story is not atypical. In 2011, on average, one rhino was butchered for its horn every 21-22 hours.<sup>28</sup> These numbers have only continued to escalate in 2012 and 2013.<sup>29</sup> This section will explain the problem of rhinoceros poaching and compare it to the lessons learned from the elephant poaching crisis. This section will also explain the primary locations of the illegal rhinoceros poaching and trade and the main reasons behind the activity.

### A. The Problem

The international community has proclaimed that rhinoceros poaching has reached a crisis point.<sup>30</sup> Rhinoceros have been classified as an endangered species for the purposes of regulated international trade since 1973.<sup>31</sup> Because of the rhino's endangered species status, there are very strict regulations on whether, how, and when rhinos can be traded internationally.<sup>32</sup> However, because of high demand for their horns, rhinoceros are being poached regularly. In 2011, almost 400 rhinoceros were killed.<sup>33</sup> In 2012, poachers killed 668 rhinos and

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<sup>28</sup> E.g., Slater-Jones, *supra* note 16; Barbara Maregele, *Protesters Seek More State Assistance to Save Rhinos*, CAPE TIMES (S. Afr.), Sept. 23, 2011, at 6.

<sup>29</sup> See *Update on Rhino Poaching Statistics*, S. AFR. DEP'T OF ENV'T'L AFFAIRS (Dec. 19, 2012), [https://www.environment.gov.za/?q=content/stats\\_rhino\\_poaching\\_update](https://www.environment.gov.za/?q=content/stats_rhino_poaching_update).

<sup>30</sup> Jenna Bonella, *Progress Made to Stop Illegal Wildlife Trade*, WORLD WILDLIFE FUND, Aug. 24, 2011, <http://worldwildlife.org/press-releases/progress-made-to-stop-illegal-wildlife-trade> (stating that rhinoceros and elephant poaching was a major area of concern at the 61st meeting of the CITES Standing Committee, where conservation groups urged the international community to take further steps to prevent this illegal activity).

<sup>31</sup> See CITES, *supra* note 14, apps. I-II.

<sup>32</sup> See CITES, *supra* note 14, arts. 3-4.

<sup>33</sup> See, e.g., WWF: *Record Rhino Poaching in South Africa*, VOICE OF AM. NEWS, Nov. 2, 2011, <http://www.voanews.com/content/wwf-record-rhino-poaching-in-south-africa-133173778/159118.html> (claiming the number of rhino killed in South Africa as of early November 2011 was 341—already eight more than the total number in 2010—and predicting the number of rhinos poached in 2011 to reach 400); Slater-Jones, *supra* note 16 (stating that at least 279 rhino have been butchered in 2011 and the total estimated for the end of the year is likely to be around 400); *Hunting Laws Abused*, MERCURY (S. Afr.), Sept. 7, 2011, at 11 (stating

158 have already been poached this year.<sup>34</sup> With only about 20,000 white rhinoceros left in South Africa,<sup>35</sup> the white rhinoceros may soon become extinct if the poaching continues.

Like the white rhino, elephants are poached for their ivory tusks. A comparison can be drawn, and lessons can be learned from, the elephant poaching crisis.<sup>36</sup> Both rhinoceros poaching and elephant poaching come with common myths and misconceptions. While rhinoceros poaching myths tend to center on the use of the horn itself, elephant misconceptions stem from the belief that taking the tusks is not hurting the animals: “Another problem . . . is that the Chinese word for ivory is elephant’s teeth—*xiang ya* . . . . Seventy percent thought tusks can fall out and be collected by traders and grow back.”<sup>37</sup> Thus, the common belief lies in the misconception that elephants do not have to be killed for their tusks.<sup>38</sup>

While many people know about elephant poaching, white rhinoceros poaching has been overshadowed. Since white rhinoceros

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that at least 279 rhino have been killed as of early September 2011 and that the estimated total death toll for the year will likely be the highest ever).

<sup>34</sup> See *Update on Rhino Poaching Statistics*, *supra* note 29; see also Lynn Herrmann, *Eight Rhinos Killed in One Day in South Africa, First 2012 Deaths*, DIGITAL J. (Can.), Jan. 11, 2012 (noting that the first eight white rhino deaths of 2012 were believed to be poached in one day, making it an unprecedented one-day total).

<sup>35</sup> Lyse Comins, *Wildlife Staff: Rangers Bust for Poaching: Questions Raised about Senior Officials in Rhino Horn Syndicates*, INDEP. ON SAT. (S. Afr.), Oct. 1, 2011, at 2.

<sup>36</sup> Elephant poaching peaked “[d]uring the great elephanticide of the 1970s and 1980s, [when] Africa’s elephant population was cut from an estimated 1.3 million to some 600,000 . . . . At the height of the slaughter, it is believed, 70,000 elephants a year were being killed continent-wide.” Alex Shoumatoff, *Agony and Ivory*, VANITY FAIR (Aug. 2011), <http://www.vanityfair.com/culture/features/2011/08/elephants-201108>. While elephant poaching has decreased due to awareness, public outcry, and stricter enforcement of international laws and regulations, it remains a problem. See *id.* Poachers continue to hunt elephants for the ivory in their tusks. Like the rhino horn, obtaining an elephant’s ivory tusks is worth the risk for poachers, pricing at about \$700 USD per pound. See *id.* In 2010 alone, the ivory trade accounted for an estimated \$114 billion USD. See *id.* There is an estimated 450,000 pounds of ivory being traded per year, meaning more than 35,000 elephants are still being killed each year. See *id.*

<sup>37</sup> See Shoumatoff, *supra* note 36 (internal quotations omitted).

<sup>38</sup> See *id.*

poaching is reaching a critical level, it is time this problem shared the spotlight with elephant poaching. Otherwise, someday soon there may not be any white rhinoceros left to save.

Veterinarians see the destruction of the white rhinos firsthand. One veterinarian described a scene in Kariega Game Reserve in the Eastern Cape in South Africa:

The horror of that first encounter remains branded in my memory. In a small clearing . . . stood an animal hardly recognizable as a rhino. His profile completely changed by the absence of his horn. Skull and soft tissue injuries extended down into the remnants of his face, through the outer layer of bones, to expose the underlying nasal passages . . . revealing pieces of loose flesh which hung semi-detached from his deformed and bloodied face . . . his left front leg . . . could only be dragged behind him. To compensate, he used his mutilated muzzle and nose as a crutch . . . [h]is one eye was injured and clouded over, adding to his horrific appearance . . . [his] blood was bubbling inside his skull cavity and [I] wondered how every breath must add to the agony, the cold air flowing over inflamed tissues and exposed nerves . . . he had little chance of healing.<sup>39</sup>

This is the state in which these poor rhinoceros are left once the poachers are through getting the horn they came for. Most of the time, poachers tranquilizer darts to bring the rhino down before they take chainsaws and axes to the rhinoceros.<sup>40</sup> However, the drugs are generally not strong enough to kill the rhinos, so most are left to bleed to death, or park rangers are forced to euthanize them when found.<sup>41</sup> The injuries to the rhinoceros are usually too severe to heal, so they are forced to suffer, sometimes for days, before ultimately passing away—Absa suffered such a fate.<sup>42</sup>

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<sup>39</sup> William Fowlds, Op-Ed., *Revealing the Cruelty Inflicted on Rhinos*, MERCURY (S. Afr.), Aug. 29, 2011, at 6, <http://www.iol.co.za/mercury/revealing-the-cruelty-inflicted-on-rhinos-1.1127041#UUpH3IVpcy8>.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

Additionally, many of the victims are female rhinoceros, who may be leaving unweaned calves behind.<sup>43</sup> Conservation groups have tried to rescue and relocate orphaned calves,<sup>44</sup> but sometimes they are too late. The calves tend to remain by their dead mothers and are often killed simply because they are in the poachers' way.<sup>45</sup> Sometimes the poachers immobilize the calves by cutting the tendons in their back legs so that the calves do not bother the poachers while they work; other times the calves themselves are butchered for their small horns and toenails.<sup>46</sup>

The South African community recognizes three primary classes of people who kill rhinoceros.<sup>47</sup> The first is the owner of a rhinoceros.<sup>48</sup> Rhino owners may obtain a permit to kill rhinos;<sup>49</sup> in such cases, the killing is legal.<sup>50</sup> However, some owners kill their rhinos without a permit and sell the horns illegally, then claim they were victims of poachers.<sup>51</sup> Some reserve owners allow or even hire poachers to come and kill their rhinoceros for illegal trading

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<sup>43</sup> See Tanya Waterworth, *Stop Legal Rhino Hunting, It's Fueling Poaching, Says SanWild*, INDEP. ON SAT. (S. Afr.), Sept. 10, 2011, at 10, <http://www.iol.co.za/news/south-africa/kwazulu-natal/legal-rhino-hunting-could-be-abolished-1.1134863#.UUplgIVpcy8>.

<sup>44</sup> See *id.* (stating that many orphaned calves are taken to SanWild, a wildlife sanctuary, where they are treated and hand raised).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> *Legalizing Rhino Horn Trade will Stop the Slaughtering of Animals*, STAR (S. Afr.), Sept. 24, 2011, at 14.

<sup>48</sup> See *Hunting Laws Abused*, *supra* note 33 (stating that "more than a quarter of [South Africa's] rhinos are privately owned" on private game reserves).

<sup>49</sup> See *id.* (stating that 140 rhino hunting permits have been issued by national agencies); Marianne Merten, *Move Afoot to Stomp Out Rhino Poaching*, DAILY NEWS (S. Afr.), Aug. 31, 2011, at 6, <http://www.iol.co.za/scitech/science/environment/move-afoot-to-stomp-out-poaching-1.1127598#.UUspwYVpcy8> (reporting on South Africa's rhino hunting permit system).

<sup>50</sup> See *Legalizing Rhino Horn Trade will Stop the Slaughtering of Animals*, *supra* note 47.

<sup>51</sup> See Caryn Dolley, *Some Rhino Owners Selling Horns*, CAPE TIMES (S. Afr.), July 19, 2012, at 7, <http://www.iol.co.za/news/crime-courts/some-rhino-owners-selling-horns-1.1345156#.UUsp-IVpcy8> (reporting that some of the owners are at the center of major rhino horn syndicates).

purposes.<sup>52</sup> These poachers make up the second class. The reserve owner will generally take a portion of the proceeds generated from the sale of the poached rhino horn.<sup>53</sup> Finally, the true poachers make up the third class.<sup>54</sup> These poachers are generally indiscriminate about the rhinos that they kill. This group is the largest, and is rapidly growing.<sup>55</sup>

#### B. Where?

The overwhelming majority of the world's white rhinoceros population—ninety-three percent—is located in South Africa.<sup>56</sup> Because most rhinos live in South Africa, the majority of the poaching problem occurs there. However, poaching occurs in some Asian countries, like India, as well.<sup>57</sup>

The main destination for the poached horns is Asia; specifically, Southeast Asian countries like the Socialist Republic of Vietnam [hereinafter Vietnam], which, according to the World Wildlife Fund (WWF), is the biggest consumer of illegal rhinoceros horns.<sup>58</sup> Vietnam is not only a destination for the horns, but is also a transit country—it serves as the hub where the horns are imported and then sent to other Southeast Asian countries.<sup>59</sup> Because Vietnam is a critical country in the illegal trade of white rhinoceros horns, the South African government recently met with Vietnamese officials to

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<sup>52</sup> See *Legalizing Rhino Horn Trade will Stop the Slaughtering of Animals*, *supra* note 47.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *Traditional Medicine*, *supra* note 19.

<sup>57</sup> E.g., *Kaziranga Takes Battle to Poachers' Court*, PIONEER (India), Sept. 23, 2011 (stating that poachers have been caught in Assam, India poaching the one horned rhino).

<sup>58</sup> See WWF: *Record Rhino Poaching in South Africa*, *supra* note 33; see also WWF *Calls for End to Rhino Poaching on World Rhino Day: At Least 287 Rhinos Have Been Killed in South Africa as Crisis Escalates*, PRWEB.COM (Sept. 21, 2011), [http://www.prweb.com/releases/World\\_Wildlife\\_Fund/World\\_Rhino\\_Day/prweb8816028.htm](http://www.prweb.com/releases/World_Wildlife_Fund/World_Rhino_Day/prweb8816028.htm).

<sup>59</sup> See Merten, *supra* note 19.



sign a memorandum of understanding.<sup>60</sup> This memorandum serves as a means of cooperation between the two countries, and the goal of the document is for the countries to work together to prevent the illegal trade and smuggling of rhino horns.<sup>61</sup>

### C. Why?

As previously stated, South Africa is the primary source for horns and the demand is primarily in Southeast Asia.<sup>62</sup> But why is the demand so high in this region?

Crushed rhinoceros horns are used as an ingredient in ancient Asian medicines.<sup>63</sup> The horn is purported to have detoxifying properties and is prepared by being ground up in a serrated bowl and consumed with water or alcohol.<sup>64</sup> Traditionally, the medicines have been used to treat fever, high blood pressure,<sup>65</sup> strokes,<sup>66</sup> and as an aphrodisiac.<sup>67</sup> More recently, the medicines have also been used as a cure for cancer.<sup>68</sup> In fact, a Vietnamese government minister stated that he was “cured of cancer through mixing a rhino horn

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<sup>60</sup> See *Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horns*, VIET. NEWS BRIEF, Sept. 29, 2011; see also *infra* Part IV.F.

<sup>61</sup> See *Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horns*, *supra* note 60.

<sup>62</sup> See *Traditional Medicine*, *supra* note 19; *WWF Calls for End to Rhino Poaching on World Rhino Day: At Least 287 Rhinos Have Been Killed in South Africa as Crisis Escalates*, *supra* note 58.

<sup>63</sup> See *Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horns*, *supra* note 60.

<sup>64</sup> See Paul Ash, *Rise in Vietnamese Use of Rhino*, SUN. TIMES (S. Afr.), Aug. 26, 2012, <http://www.bdlive.co.za/national/science/2012/08/26/rise-in-vietnamese-use-of-rhino>.

<sup>65</sup> See *id.*

<sup>66</sup> See *UK Secures International Agreement to Combat Illegal Rhino Trade*, *supra* note 20.

<sup>67</sup> See Masoka Dube, *South Africa: Poisoned Horn Won't Deter Poaching in the Kruger*, ALLAFRICA.COM (Sept. 15, 2011), <http://allafrica.com/stories/201109160364.html>; but see Ash, *supra* note 64 (“[D]espite the pervasive media myth, rhino horn has not previously been used as an aphrodisiac.”).

<sup>68</sup> See, e.g., *Smuggling of Rhino Parts Goes Online*, CHANNEL NEWSASIA (Sing.) (Sept. 5, 2011), <http://wildsingaporenews.blogspot.com/2011/09/smuggling-of-rhino-parts-goes-online.html>; Slater-Jones, *supra* note 16.

concoction.”<sup>69</sup> This belief has spurred rhino poaching to such a degree that the once critically endangered Javan rhinoceros, a Vietnam native, was declared extinct in October 2011.<sup>70</sup>

The belief in the healing power of rhino horns, however, is untrue— “rhino horn is made up of the same substance as our fingernails and has no medicinal value whatsoever, so what people say is a myth and not fact.”<sup>71</sup> This false belief triggers the demand of horns and is difficult to disprove for several reasons. First, the myth is embedded in the ancient culture of Southeast Asia.<sup>72</sup> To disprove it, thousands of people must be convinced that much of their ancient belief system is scientifically untrue. Such beliefs are difficult to overcome.<sup>73</sup> However, Vietnamese conservation groups are working to remedy this lack of understanding by distributing medical reports that definitively prove that rhino horns have no special medicinal value.<sup>74</sup> Second, people in countries like Vietnam often only know of the therapeutic uses of the horns and not of the countervailing injury to the animals and the environment.<sup>75</sup>

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<sup>69</sup> Anna Majavu, *Big-Money Rhino Crime*, TIMES (S. Afr.), Aug. 30, 2011 (internal quotation marks omitted).

<sup>70</sup> See Mike Ives, *Javan Rhino Now Extinct in Vietnam, WWF Says*, NBC NEWS, [http://www.msnbc.msn.com/id/45031207/ns/world\\_news-world\\_environment/t/javan-rhino-now-extinct-vietnam-wwf-says/](http://www.msnbc.msn.com/id/45031207/ns/world_news-world_environment/t/javan-rhino-now-extinct-vietnam-wwf-says/) (last updated Oct. 25, 2011, 10:24 AM).

<sup>71</sup> Asha Muktar, *High Price of Rhino Horn Fuels Poaching*, NAIROBI STAR (Kenya), Sept. 23, 2011 (internal quotation marks omitted).

<sup>72</sup> See Sheree Bega, *Vietnam Joins Anti-Poaching Rhino Campaign; Consumer Countries Get on Board to Stem Change*, STAR (S. Afr.), Oct. 3, 2011, at 4, <http://www.iol.co.za/saturday-star/vietnam-joins-anti-poaching-rhino-campaign-1.1149550#.UU52foVpcy8>.

<sup>73</sup> Such beliefs can be difficult to overcome especially because rhinoceros horns are not only believed to be cures for ailments, but were once seen as a status symbol. See *id.* For example, Asian royalty used to drink from cups made from rhinoceros horn. *Id.* The horns are also given as gifts to “curry favor with socio-economic and political elites.” See Ash, *supra* note 64. Arguments for how the ancient belief system can be overcome are beyond of the scope of this comment.

<sup>74</sup> See Bega, *supra* note 72.

<sup>75</sup> See *id.*

Due to the high demand, rhino horn's reportedly sell for roughly \$5,813 USD to \$7,556 USD per horn in Southeast Asia.<sup>76</sup> Because trade in white rhino horns is illegal, the exact value of the horn is hard to determine, but it is estimated that a large rhino horn could potentially sell for \$1,000,000 USD if sold in the United States.<sup>77</sup> The high sale price makes poaching worth the risk for many poachers, which is a major factor contributing to the continuation of the poaching problem.<sup>78</sup>

### III. THE EXISTING LAW

Since illegal poaching and trade of the white rhinoceros transpires across international boundaries, prevailing international governance plays a large role. This section will discuss three international legal structures that affect white rhinoceros poaching and trade: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the United Nations Environmental Programme (UNEP), and World Trade Organization (WTO) agreements.

#### A. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

On March 3rd, 1973, countries from around the world gathered to create and implement CITES under the United Nations Environment Programme.<sup>79</sup> By 2009, 175 nations had signed this treaty, including South Africa and Vietnam.<sup>80</sup>

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<sup>76</sup> *Currency Converter*, OANDA, <http://www.oanda.com/currency/converter/> (last visited Dec. 18, 2012) (converting R50,000 and R65,000 South African Rand into U.S. Dollars using the date last visited as the conversion rate date). For South African Rand value of rhino horns, see *UK Secures International Agreement to Combat Illegal Rhino Trade*, *supra* note 20; Majavu, *supra* note 69; Slater-Jones, *supra* note 16.

<sup>77</sup> See Slater-Jones, *supra* note 16.

<sup>78</sup> See *id.*

<sup>79</sup> See generally CITES, *supra* note 14.

<sup>80</sup> See *Member Countries*, CITES.ORG, <http://www.cites.org/eng/disc/parties/chronolo.php> (last visited Mar. 21, 2013) (South Africa joined in 1975 and Vietnam joined in 1994).

The treaty's purpose is to recognize and protect the diverse and irreplaceable wildlife within each country.<sup>81</sup> The preamble states that each signing country should: (1) remain conscious of the aesthetic, scientific, and cultural value of its wildlife; (2) recognize that the country's citizens are the best protectors of this wildlife; (3) understand "that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade"; and (4) realize the urgent need for taking appropriate steps to ensure the protection of the endangered wildlife within each country.<sup>82</sup>

CITES defines "critically endangered species" as "any species threatened with extinction which may or may not be affected by trade."<sup>83</sup> The treaty divides the different species up into three groups: Appendix One includes critically endangered species whose trade must be strictly enforced and allowed only in exceptional circumstances to prevent further endangering their survival;<sup>84</sup> Appendix Two includes threatened<sup>85</sup> species whose trade must be strictly regulated so that such species will not become critically endangered, as well as any species whose trade would affect the trade of those threatened species;<sup>86</sup> and Appendix Three includes any species which the parties feel need to be regulated to prevent the species' exploitation.<sup>87</sup>

The white rhinoceros falls under Appendix Two, while all other rhinoceros species fall under Appendix One.<sup>88</sup> The white rhino was listed under Appendix One when the treaty originated, but its

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<sup>81</sup> See CITES, *supra* note 14, pmbl.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* art. 2.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* ("Threatened" means those species that may not be on the verge of extinction, but are still endangered).

<sup>86</sup> See CITES, *supra* note 14, art. 2.

<sup>87</sup> See *id.* art. 2.

<sup>88</sup> See *id.* apps. 1-2.

status was changed in 1995.<sup>89</sup> This transfer occurred to permit the international trade in hunting trophies.<sup>90</sup>

Article four of the treaty regulates the export and import of the species listed in Appendix Two.<sup>91</sup> To export an Appendix Two species, such as the white rhino, the trader must acquire a prior grant of permission and present an export permit.<sup>92</sup> Export permits are strictly regulated and are issued only if the following conditions are met: (1) a “Scientific Authority”<sup>93</sup> of the country issuing the export permit has stated that the export of the species will not be detrimental to its survival; (2) the specimen being exported cannot have been obtained in violation of the exporting country’s laws; and (3) if the trader is exporting a live animal, the means of export must minimize any risk of injury or cruelty to the animal.<sup>94</sup> The Scientific Authority in the exporting country will monitor the local population of the species and will limit export permits to avoid moving the species into Appendix One.<sup>95</sup> If the Scientific Authority finds that export permits need to be further limited, it will advise the appropriate managing authority of the exporting country.<sup>96</sup> In addition, to import any Appendix Two species one must present an export permit or a re-export certificate.<sup>97</sup>

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<sup>89</sup> *Listed Species Database*, CITES.ORG <http://www.cites.org/eng/resources/species.html> (last visited Nov. 7, 2011).

<sup>90</sup> *See id.*

<sup>91</sup> *See* CITES, *supra* note 14, art. 4.

<sup>92</sup> *See id.*

<sup>93</sup> “Scientific Authority” is defined as a scientific authority designated by the member country. *Id.* arts. 1, 9.

<sup>94</sup> *See id.* art. 4.

<sup>95</sup> *See id.*

<sup>96</sup> *See* CITES, *supra* note 14, art. 4.

<sup>97</sup> *See id.* Re-export refers to the exportation of an animal that was already exported and imported. A re-export certificate is needed to re-export any species listed under Appendix Two. *See id.* A re-export certificate will be granted only if the applicant meets the following conditions: (1) the government of the country of re-export is satisfied that the specimen was imported into that country in accordance with the provisions of CITES; and (2) if the trader is exporting a live animal, the means of export will be done in the best way possible to minimize risk or injury or cruelty to the animal. *Id.*

Article six further defines the criteria needed to obtain export, import, and re-export permits and certificates.<sup>98</sup> Article seven lists exceptions to the regulations—including trade within the country itself, household effects, and species bred in captivity—none of which apply to the international trade in white rhinoceros horns.<sup>99</sup> Article eight states that the participating countries “shall take appropriate measures to enforce the provisions of [CITES] and to prohibit trade in specimens in violation thereof.”<sup>100</sup> Such measures include penalizing trade in or possession of any species protected by CITES, as well as confiscating and returning species and specimens to the country of export.<sup>101</sup> Additionally, each country shall keep records of the export and import of any species listed in CITES, including the contact information of traders, the number of permits issued, and information concerning the species and specimens traded.<sup>102</sup> Every participating country must periodically update the CITES Secretary with information on the country’s implementation of the regulations of the treaty.<sup>103</sup> If a country fails to effectively implement the conditions of CITES, the next Conference of the Parties<sup>104</sup> will review the country’s laws and consider remedial actions.<sup>105</sup>

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<sup>98</sup> See CITES, *supra* note 14, art. 6. An export permit has been granted, it must be used within six months from the date on which it was granted. *Id.* Each export permit must contain the following information: the CITES title, the name and any identifying stamp of the granting country’s government, and a control number assigned by that government. *Id.* All export permits and certificates must be in the original form and separate permits are required every time a trader exports a species or specimen. *Id.* The importing country cancels and retains the export permit after the species or specimen arrives, as well as any corresponding import permit. *Id.* When appropriate, a government may put a mark on specimens to help in identification. *Id.* “For these purposes ‘mark’ means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.” *Id.*

<sup>99</sup> See CITES, *supra* note 14, art. 7.

<sup>100</sup> See *id.* art. 8.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See CITES, *supra* note 14, art. 11 (A Conference of the Parties is when delegations from all of the countries participating in CITES have a meeting to review the implementation of the treaty, to make any needed amendments, to hear reports from participating countries, to make recommendations for better

Since its inception, the parties to CITES have been specifically concerned with the trade of rhinoceros.<sup>106</sup> In November 1994, the Ninth Conference of Parties passed Resolution Conference 9.14, which effectively transferred the white rhinoceros from an Appendix One species to an Appendix Two species.<sup>107</sup> The reason for the change was to allow trade in white rhinoceros hunting trophies.<sup>108</sup> The Second Conference of the Parties established the general exception for trade in hunting trophies of species listed in Appendix One in March 1979.<sup>109</sup> The Resolution creating the exception permits trading only according to Article Three's regulations.<sup>110</sup> These regulations include the need for export and import permits, which the state's Scientific Authority may grant as

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implementation, etc. The Conference of the Parties is held every two to three years).

<sup>105</sup> See *id.* art. 13.

<sup>106</sup> See *id.* apps. I-II (Rhinoceros has always been listed as an Appendix One endangered species).

<sup>107</sup> CITES, *Conservation Of and Trade In African and Asian Rhinoceroses*, Res. Conf. 9.14 (Rev. CoP15) (Nov. 7-18, 1994) [hereinafter CITES Res. Conf. 9.14], <http://www.cites.org/eng/res/index.php>.

<sup>108</sup> See CITES, *supra* note 14, apps. I-II. While the reasons for the shift of the white rhino from Appendix One to Appendix Two are not explicitly stated, a reasonable comparison can be drawn to the movement of the black rhinoceros from Appendix One to Appendix Two for hunting trophy purposes. In October 2004, the Thirteenth Conference of the Parties moved the black rhinoceros from Appendix One to Appendix Two, ten years after the white rhino was similarly moved. CITES, *Establishment of Export Quotas for Black Rhinoceros Hunting Trophies*, Res. Conf. 13.5 (Rev. CoP14) (Oct. 2-14, 2004), <http://www.cites.org/eng/res/index.php>. The Conference defined a hunting trophy of a black rhinoceros as "the horns or any other durable part of the body, mounted or loose." *Id.* The Conference recognized that the black rhino is threatened, but believed that its threatened status was recovering and that conservation was being effectively managed. *Id.* Therefore, the Conference decided that the financial benefits of permitting the trade in black rhinoceros hunting trophies outweigh the potential danger of extinction, but that trade must be limited, allowing only five black rhino hunting trophies to be exported from South Africa per year. *Id.*

<sup>109</sup> CITES, *Trade in Hunting Trophies of Species Listed In Appendix I*, Res. Conf. 2.11 (Rev.) (Mar. 19-30, 1979) [hereinafter CITES Res. Conf. 2.11], <http://www.cites.org/eng/res/index.php>.

<sup>110</sup> See *id.* at 1.

long as exportation of the trophies is not “detrimental to the survival of the species.”<sup>111</sup>

Since the white rhino’s reclassification by Ninth Conference of the Parties’, there has been concern that some countries are not effectively implementing the exportation regulations of Appendix Two species, such as the white rhino.<sup>112</sup> At the Fifteenth Conference of the Parties—held between March 13th and 25th, 2010—delegates expressed concern over the continued drastic decline of the rhinoceros despite measures taken to protect it by member countries, such as South Africa.<sup>113</sup> The Conference recognized that the primary reason for this continuing decline is the illegal trade in rhinoceros horns and that this trade is a “global law enforcement problem.”<sup>114</sup> The globalization of the threat to the species is increasing the cost of protecting the rhinoceros beyond some countries’ means;<sup>115</sup> the Conference therefore called upon other nations, international organizations, non-profit aid groups, and others to help fund the conservation and protection of rhinoceros.<sup>116</sup> The Fifteenth Conference further urged countries trading in rhinoceros horns to adopt “more comprehensive and effective legislation and enforcement controls, including international trade restrictions and penalties, aimed at reducing illegal trade,”<sup>117</sup> and to engage in more vigilant law enforcement, early detection, and international law enforcement cooperation.<sup>118</sup>

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<sup>111</sup> See *id.*

<sup>112</sup> CITES, *Review of Significant Trade in Specimens of Appendix-II Species*, Res. Conf. 12.8 (Rev. CoP13) (Nov. 3-15, 2002), <http://www.cites.org/eng/res/index.php>.

<sup>113</sup> See CITES Res. Conf. 9.14, *supra* note 107.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* (the trade in rhinoceros horns extends beyond the home countries’ borders and CITES recognizes that many of these home countries may be incapable of international law enforcement. Additionally, CITES recognizes that many of the home countries do not have adequate resources to do all that is necessary to end the trade).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 1.

<sup>118</sup> See CITES Res. Conf. 9.14, *supra* note 107. The Conference also recognizes the primary reason behind the continuing demand: traditional medicine use. CITES, *Traditional Medicines*, Res. Conf. 10.19 (Rev. CoP14) (June 9-20, 1997),



To address the growing concerns regarding the decline in rhinoceros, the Fifteenth Conference of the Parties directed the Secretariat<sup>119</sup> to further examine the rhino conservation and trade policies in countries where illegal killing of rhinoceros poses a significant threat to the survival of the species.<sup>120</sup> The Conference also directed the Secretariat to examine efforts to reduce the illegal trade in importing countries.<sup>121</sup> The Conference stressed the urgency of the problem and the great need for cooperation between countries engaged in rhinoceros horn trading.<sup>122</sup>

However, if the problem is so urgent, and the decline in white rhinoceros is so rapidly occurring, why hasn't CITES placed the white rhinoceros back on Appendix One where it cannot be hunted at all? The black rhino, also switched from Appendix One to Appendix Two for hunting trophy purposes, was declared extinct in November 2011, and the white rhinoceros may be next.<sup>123</sup> In fact, the

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<http://www.cites.org/eng/res/index.php>. The Conference acknowledges that East Asian traditional medicines often use endangered species and that this use can be a potential threat to such species. *Id.* While organizations, such as the World Health Organization, and treaties, such as CITES, acknowledge the importance of traditional medicine in Asian cultures, the Conference believes that measures need to be taken to increase understanding, improve research, and further conserve the wildlife used in these medicines, such as rhinoceros horn, so the threat to the rhinoceros will not increase. *Id.*

<sup>119</sup> The Secretariat shall be provided by the Executive Director of the United Nations Environment Programme and shall arrange and service meeting of the Parties, perform functions designated to him or her under CITES, request and study reports submitted by Parties, call to the attention of the Parties any matter pertaining to CITES, prepare annual reports for the Parties, publish amendments and changes to appendices, make recommendations for the implementation of regulations under CITES, and to perform any other function designated to him or her by the Parties. *See* CITES, *supra* note 14, art. 12.

<sup>120</sup> CITES, *Conservation Of and Trade In African and Asian Rhinoceroses*, 15.71 to 15.73 (Mar. 13-25, 2010), <http://www.cites.org/eng/res/index.php>.

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See Black Rhino Extinct, White Rhinos Next*, INT'L BUS. TIMES, Nov. 11, 2011, <http://au.ibtimes.com/articles/247342/20111111/black-rhinos-extinct-white-javan-international-union.htm#> (stating that the IUCN declared the black rhinoceros extinct); *see also* Lewis Smith, *The Last Charge as Western Black Rhino is Declared Extinct*, INDEP. (U.K.), Nov. 10, 2011, at 10, <http://www.waterconserve.org/shared/reader/welcome.aspx?linkid=252993&keybold=extinction%20AN%20D%20%20species%20AND%20%20brink>.

International Union for Conservation of Nature (IUCN) declared that the white rhinoceros is “possibly extinct” in northern Africa and the white rhinoceros in southern Africa is endangered.<sup>124</sup>

Likely because the southern white rhino came back from near extinction,<sup>125</sup> it was moved to Appendix Two. Nevertheless, the white rhino population is now declining once again.<sup>126</sup> The extinction of the black rhino caused CITES Secretary-General John Scanlon “grave concern.”<sup>127</sup> He believes CITES can no longer rely on previously used methods to combat rhino poaching and trafficking.<sup>128</sup> Hopefully, concern about the survival of the white rhino will inspire CITES members to move the white rhino back to Appendix One.

However, some advocates contend that legalizing the trade in rhino horns is the only way to stop the abuse of the CITES permit system.<sup>129</sup> They argue that removing the illicit elements of the rhino horn trade would reduce the market price, thereby de-incentivizing poachers by lowering potential profits.<sup>130</sup> Two-thirds of CITES

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<sup>124</sup> See *Black Rhino Extinct, White Rhinos Next*, *supra* note 123; Smith, *supra* note 123; see also *Black Rhinos, Two Other Species Extinct: The Economics of Conservation*, INT'L BUS. TIMES, Nov. 10, 2011.

<sup>125</sup> See *Black Rhinos, Two Other Species Extinct: The Economics of Conservation*, *supra* note 124; Neo Maditla, *We're Stepping Up to Rhino War—Conservationists: Prosecutors Getting Special Training*, CAPE ARGUS (S. Afr.), Dec. 15, 2011 (stating that in the 1930s there were fewer than 100 white rhino left in the world; today there are about 20,000).

<sup>126</sup> See Maditla, *supra* note 125; see also Slater-Jones, *supra* note 16.

<sup>127</sup> See *Head of UN-Backed Convention Urges Greater Effort to Combat Illegal Rhino Trade*, U.N. NEWS CENTRE (Nov. 10, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40361&Cr=endangered&Cr1=#.UNICp4VpfSk>.

<sup>128</sup> See *id.*

<sup>129</sup> See Sheree Bega, *Vietnamese Issued with 69% of Rhino Hunting Licenses*, SAT. STAR (S. Afr.), Nov. 19, 2011, <http://www.security.co.za/fullStory.asp?NewsId=19600>; John Hume, Op-Ed., *Seven Good Reasons to Legalize Rhino Horn Trade*, TIMES (S. Afr.), Mar. 28, 2012, <http://www.timeslive.co.za/ilive/2012/03/28/seven-good-reasons-to-legalise-rhino-horn-trade-ilive> (Mr. Hume lists seven reasons he believes the trade should be legal. For example, he advocates giving consumers the option of buying from a legal source; he argues the horn can be harvested sustainably; and he claims the rhino numbers would increase).

<sup>130</sup> See Bega, *supra* note 129; see also *Parks Sitting on U.S. \$10 Million Ivory*, HERALD (Zim.), Oct. 12, 2011, <http://allafrica.com/stories/201110130194.html>; Michael Eustace, Op-Ed., *Legal Horn Trade Could Save Our Rhino 13 and Africa's*

member nations in attendance at the meeting would have to agree for CITES to lift the ban on rhino horn trade.<sup>131</sup> Such a majority seems unlikely given the current state of rhinoceros populations around the world. South Africa considered lifting its ban on rhino horn trading and commissioned a national study on the viability of legalization and its potential impact on the global market.<sup>132</sup> However, South Africa has stated it is not ready to propose lifting the ban and has tabled any proposal until 2016.<sup>133</sup>

In July 2012, CITES held its 62nd meeting of the Standing Committee, in which over 350 participants—from parties, to

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*Parks*, BUS. DAY (S. Afr.), Jan. 20, 2012 (this opinion piece believes that the CITES ban on rhino horn trading simply pushed the trade underground, where it has flourished and created a black market. The trade has made criminals rich and has degenerated Africa's parks. If the rhino horn trade was legal, South Africa could supply the market with approximately 600 rhino horns from natural deaths, as well as from their private government stock, which would supply the market for several years and effectively curb poaching. This would be the most cost-effective approach for the countries involved. The article proposes a central selling organization, with owners of rhinos, buyers, and sellers sharing in the profits, meaning a lot of money will go to the South Africa government, as the largest number of rhinos is under national park control. The horns would be marked and have a DNA signature so there would be no room for fraud. The article acknowledges the opposing argument—that legalizing the trade will further stimulate the illegal trade and that the demand for the horns is insatiable. But the author believes that there will be no room for an illegal market if there is a legal one).

<sup>131</sup> See *Parks Sitting on U.S. \$10 Million Ivory*, *supra* note 130.

<sup>132</sup> See Tony Carnie, *Proposal to Lift Rhino Horn Trade Ban Revisited*, MERCURY (S. Afr.), Sept. 1, 2011; Masoka Dube, *Study into Legalizing Rhino Horn Trade*, STAR (S. Afr.), Oct. 3, 2011, <http://www.iol.co.za/the-star/study-into-legalising-rhino-horn-trade-1.1148961>; Statement by Edna Molewa, Minister of Water and Environmental Affairs on Rhino Poaching After Engaging Provinces (Oct. 12, 2011) [hereinafter Molewa Rhino Poaching Statement], <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=22317&tid=45856>; see also Eustace, *supra* note 130.

<sup>133</sup> See Tony Carnie, *SA 'Not Ready' to Lift Ban on Horn Trade*, MERCURY (S. Afr.), Apr. 5, 2012, <http://www.iol.co.za/mercury/sa-not-ready-to-lift-rhino-horn-trade-ban-1.1270655#.UUuxvIVpcy8> (reporting that South Africa is not ready to propose a lift on the 30 year old ban on the rhino horn trade. The article reports that South Africa still sees many hurdles in its way before it can consider this option, such as legalities and formal support from the trade partners in Asia); Sue Blaine, *SA Defers Making a Decision on Trade in Rhino Horn*, BUS. DAY (Oct. 4, 2012), <http://news.yahoo.com/sa-defers-making-decision-trade-rhino-horn-053317954--finance.html>

intergovernmental bodies, to non-governmental organizations—met to discuss the agenda for the Sixteenth Conference of the Parties.<sup>134</sup> The committee made decisions concerning countries involved in the ivory trade, trade in rhino horns, and trade in tigers.<sup>135</sup> Vietnam was instructed to prepare a report on its progress, on measures taken to supplant the illegal trade, and its current inventory of rhinoceros hunting trophies.<sup>136</sup> Failure to do so could result in a suspension of all trade in any species listed under CITES.<sup>137</sup> The Standing Committee also instructed CITES's Rhino Working Group<sup>138</sup> to develop a

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<sup>134</sup> See *CITES Meeting to Tackle Smuggling of Elephant Ivory and Rhino Horn*, UNEP NEWS CTR. (July 25, 2012), <http://www.unep.org/newscentre/default.aspx?DocumentID=2691&ArticleID=9234>.

<sup>135</sup> See *CITES Bares Teeth, But Can It Bite?*, WORLD WILDLIFE FUND GLOBAL (July 27, 2012), [http://wwf.panda.org/wwf\\_news/?205796](http://wwf.panda.org/wwf_news/?205796).

<sup>136</sup> See *id.*; *CITES Acts to Curb Smuggling of Elephant Ivory and Rhino Horn*, WEB NEWSWIRE (Aug. 10, 2012), <http://htsyndication.com/htsportal/article?arid=%2275460%22&pub=%22Web+Newswire%22>.

<sup>137</sup> See *id.*

<sup>138</sup> At its 61st meeting in August 2011, the Standing Committee established a Rhinoceros Working Group tasked with identifying measures that could be taken by CITES Parties to reduce the impact of illegal trade on the conservation of rhinoceroses and to enhance existing controls on trade in rhinoceros horn products. CITES Notification to the Parties No. 2012/014, Conservation Of and Trade In African and Asian Rhinoceroses (Feb. 20, 2012), [www.cites.org/eng/notif/2012/E014.pdf](http://www.cites.org/eng/notif/2012/E014.pdf). The Working Group acknowledged that Vietnam was a major country involved in the trafficking problem and requested Vietnam answer the following questions to present at the Sixteenth Conference of the Parties: (a) the legislation governing rhino horn trade and penalties for illegal trade; (b) measures implemented to prevent illegal import and trade in rhino horn; (c) current ongoing activities to combat illegal rhino horn trade; (d) specific enforcement actions over the past three years to prevent illegal trade in rhino horn and the results of such operations; (e) is a multi-disciplinary approach followed to prevent illegal rhino horn trade and if so which authorities are involved?; (f) measures implemented to prevent rhino horns from going into commercial trade. For example, are owners of such horns mandated to hold possession licenses? Are they allowed to give away or sell the horn in their possession? Are there specific legislation for this purpose?; (g) what measures are in place to monitor the retail market?; (h) efforts to curtail advertising of rhino horn, including via Internet; (i) are the use of rhino horn as a palliative medicine for cancer in any way allowed?; (j) what are being done to curtail the use of rhino horn as an additive to drinks, etc.?; (k) provision, in a table, detailing how many seizures of rhino horn they have made, how many people have been arrested, how many convictions and the sentences rendered, etc.; and (l) feedback with regard to progress made in the stock check of rhinoceros hunting trophies to verify the use of such trophies. CITES, *Interpretation*

“demand reduction strategy.”<sup>139</sup> More than 50 countries submitted proposals regarding species protection to the Standing Committee to be heard at the Sixteenth Conference of the Parties.<sup>140</sup>

In March 2013, CITES celebrated forty years at its Sixteenth Conference of the Parties held in Bangkok, Thailand.<sup>141</sup> The conference added to and toughened agreements on the trade of rhino horns, including “measures to boost forensic testing of seized or stockpiled contraband, a strategy that uses DNA and other scientific clues to pursue poachers and smugglers.”<sup>142</sup> Additionally, delegates approved the requirement that the eight countries where most illegal trade in rhino horns occurs—China, Kenya, Malaysia, Philippines, Tanzania, Thailand, Uganda and Vietnam—must increase enforcement efforts or risk sanctions.<sup>143</sup> Based on the answers Vietnam submitted to the Rhino Working Group, the delegates at the Sixteenth Conference of the Parties decided the following: the South African restriction against granting hunting permits to Vietnamese citizens will remain in place, Vietnam must continue to monitor and protect rhinos, Vietnam should increase surveillance at ports and airports, and Vietnam must continue to report to the Secretariat all measures it has taken to regulate the possession of rhino hunting trophies and provide “updated details of seizures and prosecutions, including details of penalties imposed.”<sup>144</sup> The Conference also recognized that Vietnam has made some strides, such as educating rangers, customs officials, and the public, and collaborating with

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*and Implementation of the Convention: Species Trade and Conservation: Rhinoceroses*, CoP16 Doc. 54.1 (Rev. 1) (Mar. 3-14, 2013), at 4 [hereinafter CITES CoP16 Doc. 54.1], <http://www.cites.org/eng/cop/16/doc/index.php>.

<sup>139</sup> See *CITES Bares Teeth, But Can It Bite?*, *supra* note 135.

<sup>140</sup> See *New Protections Sought for Polar Bear, Elephants, Manta Rays and Other Species Under UN-Backed Treaty*, UN NEWS CTR. (Oct. 5, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43222>; *Drive for Legislation, Control of Rhino Horn Sales*, STAR (S. Afr.), May 22, 2012, at 6 (detailing one such proposal by the KwaZulu-Natal conservation boss to create a legal global trade organization for rhino horn).

<sup>141</sup> CITES, <http://www.cites.org/> (last visited Mar. 21, 2013).

<sup>142</sup> See Russell McLendon, *5 Big Breakthroughs at CITES 2013*, MOTHER NATURE NETWORK (Mar. 20, 2013, 3:55 PM), <http://www.mnn.com/earth-matters/animals/blogs/5-big-breakthroughs-at-cites-2013>.

<sup>143</sup> See *id.*

<sup>144</sup> See CITES CoP16 Doc. 54.1, *supra* note 138, at 5-8.

international organizations; however, more needs to be done to combat the poaching and trafficking problem.<sup>145</sup>

## B. The United Nations Environment Programme

In 2002, the United Nations General Assembly endorsed a strategic plan, proffered by the Conference of the Parties to the Convention on Biological Diversity (CPCBD), to achieve a “significant reduction in the current state of biodiversity loss at the global, regional, and national levels” by 2010.<sup>146</sup> In 2010, proclaimed the International Year of Biodiversity, UNEP released reports on the state of biodiversity<sup>147</sup> in areas around the world.<sup>148</sup> Since CITES falls under the UNEP, UNEP’s biodiversity initiatives require discussion.

### 1. The State of Biodiversity in Africa

The report on Africa focuses primarily on the key threats to African biodiversity.<sup>149</sup> Africa was unable to meet its 2010 biodiversity goal because of its failure to implement biodiversity

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<sup>145</sup> See *id.* at 6. For a more in depth report on the findings of the Secretariat, see CITES, *Interpretation and Implementation of the Convention: Species Trade and Conservation: Rhinoceroses*, CoP16 Doc. 54.2 (Rev. 1) (Mar. 3-14, 2013), <http://www.cites.org/eng/cop/16/doc/index.php>.

<sup>146</sup> See U. N. ENV’T PROGRAMME, STATE OF BIODIVERSITY IN AFRICA 1 (2010) [hereinafter UNEP BIODIVERSITY REPORT: AFRICA], <http://www.cbd.int/iyb/doc/celebrations/iyb-egypt-state-of-biodiversity-in-africa.pdf>; U. N. ENV’T PROGRAMME, STATE OF BIODIVERSITY IN ASIA AND THE PACIFIC 1 (2010) [hereinafter UNEP BIODIVERSITY REPORT: ASIA], <http://www.unep.org/delc/Portals/119/regional%20brief%20for%20Asia%20and%20Pacific.pdf>.

<sup>147</sup> The UNEP states “[t]he word ‘biodiversity’ is a contraction of biological diversity. Diversity is a concept which refers to the range of variation or differences among some set of entities; biological diversity thus refers to variety within the living world. The term ‘biodiversity’ is indeed commonly used to describe the number, variety and variability of living organisms. This very broad usage, embracing many different parameters, is essentially a synonym of ‘Life on Earth.’” *What is Biodiversity?*, U. N. ENV’T PROGRAMME, WORLD CONSERVATION MONITORING CTR., [http://www.unep-wcmc.org/what-is-biodiversity\\_50.html](http://www.unep-wcmc.org/what-is-biodiversity_50.html) (last visited Dec. 19, 2012).

<sup>148</sup> See *id.*

<sup>149</sup> UNEP BIODIVERSITY REPORT: AFRICA, *supra* note 146, at 1.

strategies into government programs.<sup>150</sup> Despite the failure to meet biodiversity goals, forty-nine countries in Africa have national biodiversity plans; many of these countries have reported on the effectiveness of those plans, and many have expanded their protected areas for biodiversity.<sup>151</sup>

The report encourages African nations to integrate biodiversity into developing plans and policies to help effectively manage the numerous threats to Africa's biodiversity.<sup>152</sup> While there have been improvements, UNEP additionally urges expanding awareness of biodiversity's importance for the country, the economy, and the welfare of society.<sup>153</sup>

## 2. The State of Biodiversity in Asia and the Pacific

Like Africa, the countries in Asia and the Pacific also failed to achieve the CPCBD's biodiversity goals.<sup>154</sup> Asia and the Pacific are home to the highest number of endangered species in the world as well as the world's highest concentration of people, creating unique threats to Asia's biodiversity.<sup>155</sup> These nations have, however, shown their awareness of biodiversity concerns by expanding protected areas and preserving ecosystems.<sup>156</sup>

The awareness of and concern about biodiversity in both Africa and Asia can serve only to strengthen protection for endangered species, such as the white rhinoceros. With the increase in protected areas for biodiversity on both continents, regulations, and international treaties, hopefully the poaching of white rhinoceros, as well as other endangered species, will decrease.

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<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 1-2.

<sup>152</sup> *See id.* at 9-10.

<sup>153</sup> *See id.*

<sup>154</sup> UNEP BIODIVERSITY REPORT: ASIA, *supra* note 146, at 2.

<sup>155</sup> *See id.*

<sup>156</sup> *See id.* at 4-5.



### C. The World Trade Organization Agreements

While there is no specific WTO agreement on the environment,<sup>157</sup> the goal of environmental protection has been fundamental to the WTO since its inception.<sup>158</sup> Because environmental protection is an important goal, WTO rules encourage member countries to create and implement trade-related measures aimed at addressing environmental concerns.<sup>159</sup> These measures must not conflict with the overall objective of the WTO by restricting trade or affecting the rights of other WTO members.<sup>160</sup> Member nations have the right to adopt regulations on trade to protect the environment as long as these regulations comply with the General Agreement on Tariffs and Trade (GATT).<sup>161</sup> If such regulations are exempt under GATT, the regulations may still be justified under Article XX.<sup>162</sup> During negotiations in the Doha Round,<sup>163</sup> WTO

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<sup>157</sup> International trade in endangered species would most likely be contained in a WTO agreement on environmental conservation, if such an agreement existed.

<sup>158</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement] (the goals of protecting and sustaining the environment are found in the preamble of the Marrakesh Agreement and they relate to the overall objectives of the WTO, which are to reduce international trade barriers and eliminate discriminatory treatment in international trade); see also *An Introduction to Trade and Environment in the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm) (last visited Apr. 6, 2013).

<sup>159</sup> See *WTO Rules and Environmental Policies: Introduction*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm) (last visited Apr. 6, 2013).

<sup>160</sup> See *id.* (many exceptions to environmental protection rules have been created to ensure a balance between member countries' rights to basic trade and their rights to create regulations concerning the environment and public health).

<sup>161</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (1947) [hereinafter GATT] (GATT is one of the founding agreements of the WTO. Established in 1947, GATT sets forth many of the rules and agreements followed by the WTO).

<sup>162</sup> See *WTO Rules and Environmental Policies: Introduction*, *supra* note 159. (Article XX of GATT lays out exceptions in which member countries may create environmental regulations that are exempted from GATT rules, such as regulations necessary to protect the health of humans, animals or plants.)

<sup>163</sup> See *The Doha Round*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm) (last visited Apr. 6, 2013).



member nations are currently addressing environmental issues relating explicitly to multilateral trade negotiation for the first time, with the overarching objective of enhancing the “mutual supportiveness of trade and environment.”<sup>164</sup>

WTO rules do not take precedence over national regulations respecting the conservation of endangered species.<sup>165</sup> However, if there is a conflict between WTO rules and a member nation’s environmental regulations, the WTO will encourage collaboration to solve the dispute.<sup>166</sup> For example, the United States, a member nation, enacted legislation to protect sea turtles, a species on the brink of extinction due largely to incidental capture from commercial fishing.<sup>167</sup> This created a conflict between the member nations who wished to protect the sea turtles, and other WTO members who engage in commercial fishing.<sup>168</sup> The dispute came before the WTO, which urged all member nations to work together to create a mutually acceptable solution.<sup>169</sup>

Could such an arrangement work with white rhinoceros? South Africa could enact greater environmental legislation to conserve white rhinoceros. Such legislation would most likely create conflict between South Africa and other countries whose economies rely, to some extent, on illegal rhino horn trading. Vietnam is likely one such country. Is this conflict significant enough for the WTO to

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(the Doha Round is the latest round of trade negotiations among WTO members, and it seeks to reform twenty areas of international trade by revising trade rules and barriers).

<sup>164</sup> See *An Introduction to Trade and Environment in the WTO*, *supra* note 158.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *An Introduction to Trade and Environment in the WTO*, *supra* note 158; *India etc. Versus US: ‘Shrimp-Turtle,’* WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm) (last visited Apr. 6, 2013).

<sup>168</sup> See *An Introduction to Trade and Environment in the WTO*, *supra* note 158.

<sup>169</sup> See *id.*; *India etc. Versus US: ‘Shrimp-Turtle,’* *supra* note 167 (the WTO encouraged a cooperative environmental solution for the protection of sea turtles between the conflicting parties. It allowed the party member wishing to protect the sea turtles to create legislation that would not, in good faith, prohibit other countries from fishing. This “encouragement” worked and the parties ended up implementing the suggestions of the WTO).

get involved? Would the WTO encourage South Africa and Vietnam to collaborate and resolve the dispute? Since WTO agreements restrict Vietnam's right to trade, the WTO would probably not resolve such disputes between these countries, but a WTO resolution is still a useful consideration. Additionally, the Doha Round negotiations relating to trade and the environment may help eliminate the illegal rhino trade.

#### IV. THE CURRENT STATE OF THE RHINOCEROS TRADE IN SOUTH AFRICA AND VIETNAM

Member nations must enact domestic laws to enforce international agreements like CITES. This section explores how South Africa and Vietnam are domestically implementing CITES, examining the current state of each country's laws and enforcement and how poachers are eluding those laws. This section also examines each country's response to illegal rhino poaching and trade.

##### A. Current South African Law

In South Africa, much of the rhinoceros hunting occurs legally through the CITES permit system and most permitted hunters are Vietnamese.<sup>170</sup> Under this system, South African authorities are often obliged to issue hunting permits because the permit application meets the CITES criteria for trophy hunting.<sup>171</sup> However, rhinoceros poaching has increased drastically in recent years, largely a result of abuses of the permit system by "pseudo-hunters."<sup>172</sup> As a result,

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<sup>170</sup> See CITES Res. Conf. 2.11, *supra* note 109; see also *Saving the Rhino—Now*, STAR (S. Afr.), Aug. 31, 2011, at 14; Masood Boomgaard, *Reports Reveal that Most Hunters are Vietnamese*, SUN. TRIBUNE (S. Afr.), Jan. 15, 2012, at 11.

<sup>171</sup> See CITES Res. Conf. 2.11, *supra* note 109; *Saving the Rhino—Now*, *supra* note 170; Boomgaard, *supra* note 170; Press Release, S. Afr. Dep't of Env'tl. Affairs, Minister Edna Molewa Publishes Proposed Amendments to the Norms and Standards for Marking of Rhinoceros Horn and Hunting of White Rhinoceros for Trophy Hunting Purposes (Sept. 7, 2011) [hereinafter Molewa Amendments Press Release], [http://www.environment.gov.za/?q=content/molewa\\_normsandstandards\\_rhinohunting](http://www.environment.gov.za/?q=content/molewa_normsandstandards_rhinohunting).

<sup>172</sup> See Bega, *supra* note 129 (stating that over sixty-nine percent of hunting permits granted in South Africa have gone to Vietnamese "pseudo-hunters" who are fueling the rhino poaching crisis). Pseudo hunters, unlike classic

South Africa's Minister of Water and Environmental Affairs, Edna Molewa, has proposed several amendments to the current permit system.<sup>173</sup>

Among Minister Molewa's suggestions is the mandatory micro-chipping<sup>174</sup> of all rhinoceros horns, to be monitored and maintained by South Africa's Department of Environmental Affairs.<sup>175</sup> Currently, the Department is responsible for, *inter alia*, maintaining environmental quality and protection, managing ocean and coastal resources, and promoting conservation.<sup>176</sup> Thus, protecting the white rhino is clearly within the Department's purview. Minister Molewa has also suggested strengthening control over white rhino hunts, creating a more stringent hunting permit called a "TOPS" permit,<sup>177</sup> and having a conservation official supervise all hunts and provide full reports to the Department.<sup>178</sup> All applicants would be required to provide proof of membership to a hunting organization recognized by their home country to even be considered

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hunters truly engaged in trophy hunting, hunt the rhinos and take the horns back with them to Vietnam to sell on the black market, thus abusing the CITES permit system. *Id.*

<sup>173</sup> See Molewa Amendments Press Release, *supra* note 171.

<sup>174</sup> See *id.* Under the micro-chipping proposal, the permit issuing authority would implant one micro-chip into all rhinoceros, whether state owned or privately owned, as well as all the horns obtained from dehorning; the micro-chip numbers would be put into the Traffic Rhino Horn Stockpile Database, and would be kept on the Department of Environmental Affairs' national database so that the South African government can keep track of all rhino horns and their movements.

<sup>175</sup> See *id.*

<sup>176</sup> S. AFR. DEPT OF ENVTL. AFFAIRS, STRATEGIC PLAN: 1 APRIL 2011 TO 31 MARCH 2016, at 22-43 (undated), <http://www.info.gov.za/view/DownloadFileAction?id=175474> (outlining the vision, mission, values, goals, strategic objectives, and policy initiatives for South Africa's Department of Environmental Affairs regarding the country's environment).

<sup>177</sup> See Molewa Amendments Press Release, *supra* note 171 ("TOPS" stands for "threatened or protected species"). This permit would enable the issuing authority to trace rhino horns back to the hunt's location. *Id.*

<sup>178</sup> See *id.*

for a TOPS permit, which would be restricted to one white rhino trophy per year.<sup>179</sup>

Minister Molewa has also stated that South Africa should refuse all rhino hunting permit applications from Vietnam.<sup>180</sup> Furthermore, Minister Molewa's proposed amendments would mandate that, before exporting the trophy, a hunter take his kill to a local taxidermist and have a micro-chip installed in the rhino's horn.<sup>181</sup> Finally, the amendments propose taking DNA samples from rhinos before and after death to assist law enforcement in prosecutions.<sup>182</sup> While these amendments are being considered, Minister Molewa has recommended a moratorium on rhinoceros hunting.<sup>183</sup> However, hunters fear a moratorium would only increase rhino poaching, causing even more harm.<sup>184</sup>

To implement Minister Molewa's proposed amendments, South African lawmakers must amend South Africa's Biodiversity Act of 2004, specifically Chapter Seven, where the CITES permit system is encoded.<sup>185</sup> The purpose of the Biodiversity Act is to manage and conserve biodiversity within South Africa by protecting threatened or protected species<sup>186</sup> and "[giving] effect to ratified international agreements relating to biodiversity which are binding on [South

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<sup>179</sup> See *Strict New Rules to Curb Rhino Poaching, Control Hunts*, PRETORIA NEWS (Apr. 17, 2012), <http://www.iol.co.za/pretoria-news/strict-new-rules-to-curb-rhino-poaching-control-hunts-1.1277833#.UWh0tqKG2So>.

<sup>180</sup> See Sue Blaine, *No Rhino Hunt Permits for Vietnam*, BUS. DAY (S. Afr.), Apr. 5, 2012, <http://www.bdlive.co.za/articles/2012/04/05/no-rhino-hunt-permits-for-vietnam>.

<sup>181</sup> See Molewa Amendments Press Release, *supra* note 171.

<sup>182</sup> See *id.*

<sup>183</sup> See Molewa Rhino Poaching Statement, *supra* note 132 (if the moratorium were to go into effect, no rhinoceros hunting would be permissible, even if it had been permissible under the permit system. Minister Molewa has considered recommending a moratorium as a last resort to end rhino poaching. The minister can impose a moratorium if there is clear abuse or a complete collapse in the permit system.); see also Merten, *supra* note 19 (stating that Minister Molewa hopes to begin the moratorium soon, but that it will be a challenge and will probably not begin any sooner than late 2012).

<sup>184</sup> See *Ban Worries Hunters*, MERCURY (S. Afr.), Sept. 2, 2011, at 3.

<sup>185</sup> Biodiversity Act 10 of 2004 ch. 7 (S. Afr.), <http://www.info.gov.za/acts/2004/a10-04/>.

<sup>186</sup> *Id.* § 51.

Africa].”<sup>187</sup> The Minister of Environmental Management is responsible for ensuring that the Act’s objectives are being achieved; currently, Minister Molewa holds this position.<sup>188</sup> The Act also establishes the South African Nation Biodiversity Institute—the scientific authority CITES suggests—to monitor and report on the state of biodiversity in South Africa.<sup>189</sup>

Chapter Seven of the Act implements the permit system.<sup>190</sup> This Chapter sets out the permit application standards,<sup>191</sup> requirements,<sup>192</sup> and provides a permit cancellation process.<sup>193</sup> Chapter Seven also creates an appeals procedure for those unhappy with the decision of the issuing authority.<sup>194</sup> Under this system, a rhinoceros hunter hoping to keep the horn as a trophy needs four separate permits: one to tranquilize the rhino, one to dehorn it, one to transport the horn, and one to keep it.<sup>195</sup>

One of the Minister’s proposed amendments will allow the issuing authority to postpone its decisions on a permit application if the applicant is under investigation for a violation of the Biodiversity Act relating specifically to rhinoceros hunting.<sup>196</sup> Another would create a new provision suspending an issued permit if the permit holder is under investigation.<sup>197</sup> These new amendments will hopefully reduce the abuse and fraud within the permit system by

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<sup>187</sup> *Id.* § 2.

<sup>188</sup> *Id.* §§ 1, 9, 35.

<sup>189</sup> *See id.* §§ 10-12, 59-61.

<sup>190</sup> Biodiversity Act 10 of 2004 § 87.

<sup>191</sup> *Id.* § 88 (stating that any person may apply, the issuing authority’s powers, and the conditions which must be met in order to grant an applicant a permit).

<sup>192</sup> *Id.* § 90 (stating that a permit must specify its purpose, the time it will be valid, any specified conditions, and any other matters prescribed).

<sup>193</sup> *See id.* § 93 (stating the issuing authority may cancel a permit at any time if the permit was issued under false pretenses or the permit holder failed to comply with the permits conditions and/or any provisions of the Act, South African law, or international law regarding the permitted activity).

<sup>194</sup> *See id.* §§ 94-96.

<sup>195</sup> *See Slater-Jones, supra* note 16.

<sup>196</sup> *See id.*

<sup>197</sup> *See id.*

warning the issuing authorities of possible fraud and giving them the authority to act.

Because white rhinos are considered “threatened or protected” species, the South African Biodiversity Act requires national protection for them.<sup>198</sup> Therefore, the majority of the white rhinos live in national parks. South Africa has nineteen national parks, including the world-renowned Kruger National Park.<sup>199</sup> Kruger is known for its impressive size, its diversity of species, its advanced environmental management and conservation, and its approximately 5,000 rhinoceros.<sup>200</sup> Due to Kruger’s size—which makes going undetected easier for poachers—and prevalence of rhinoceros, most of the world’s white rhino poaching occurs in Kruger National Park.<sup>201</sup> In fact, wildlife officials have started removing signs indicating where rhinos can be found around the park—which were in place to aid sight-seers and safari groups hoping to spot a rhino—to prevent poachers from using the signs to track down rhinos.<sup>202</sup> Authorities have also proposed reinstalling an electrified fence along the park’s border with neighboring Mozambique to physically deter poachers from entering.<sup>203</sup>

In addition to the national parks, South Africa has state game preserves that carry-out regional biodiversity conservation in their specific province and provide for eco-tourism.<sup>204</sup> These preserves are

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<sup>198</sup> See Biodiversity Act 10 of 2004 § 56.

<sup>199</sup> S. AFR. NAT’L PARKS, <http://sanparks.org.za/parks/> (last visited Apr. 6, 2013).

<sup>200</sup> *Kruger National Park*, S. AFR. NAT’L PARKS, <http://sanparks.org.za/parks/kruger/> (last visited Apr. 6, 2013).

<sup>201</sup> See Merten, *supra* note 19; *Update on Rhino Poaching Statistics*, *supra* note 29.

<sup>202</sup> Kraig Becker, *Signs Indicating Locations of Rhinos Being Removed from Kruger National Park*, GADLING TRAVEL BLOG (Dec. 15, 2011, 8:00 AM), <http://www.gadling.com/2011/12/15/signs-indicating-locations-of-rhinos-being-removed-from-kruger-n/>.

<sup>203</sup> See Sheree Bega, *Kruger Fence ‘Only Temporary Deterrent’*, CAPE ARGUS (S. Afr.), Jan. 21, 2012, at 10.

<sup>204</sup> See, e.g., EZEMVELO KZN WILDLIFE, <http://www.kznwildlife.com/index.php?/About-l-Biodiversity-Conservation-l-Ezemvelo-KZN-Wildlife.html> (last visited Apr. 6, 2013) (Ezemvelo KZN Wildlife is a game-preserve that manages the biodiversity conservation and eco-tourism of the provincial regions of

also areas subject to poaching, although to a lesser extent.<sup>205</sup> Additionally, poachers are increasingly targeting private game reserves since security and anti-poaching measures have expanded in the national parks.<sup>206</sup> On a more positive note, South Africa's wildlife sanctuaries help care for injured and orphaned animals, such as the rhino calves who are orphaned after their mothers have been poached.<sup>207</sup>

The amendments proposed by Minister Molewa and the actions of park and preserve officials are not the only recommendations offered to stop white rhinoceros poaching. One additional option to deter poaching may be preemptive government dehorning of the rhinos.<sup>208</sup> The South African government is currently undertaking a rhinoceros dehorning impact study to determine the feasibility of this option.<sup>209</sup> Another alternative might be to inject the horn with a parasiticide that is toxic to humans.<sup>210</sup> This plan was proposed by the Rhino Rescue Project<sup>211</sup> seeking a

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Khahlamba-Drakensberg, Zululand, and the coastal region. The organization's officers work in the communities bordering protected areas to ensure that the province's conservation legislation is being implemented).

<sup>205</sup> See Merten, *supra* note 19.

<sup>206</sup> See *id.*

<sup>207</sup> About Us, SANWILD.ORG, <http://www.sanwild.org/about.html> (last visited Apr. 6, 2013) (SanWild was funded by a wildlife conservation activist who began taking in orphaned and injured animals herself while working for a game preserve. Noticing the need for a rehabilitation center, as well as the unwillingness of national parks, game preserves, and private game farms to help rehabilitated animals back into the wild, the founder of SanWild purchased a large sector of land, which has since grown, and began her own rehabilitation center and sanctuary. SanWild rescues injured and orphaned wild animals and secures the animals' long-term welfare and safety).

<sup>208</sup> See, e.g., Merten, *supra* note 19; Slater-Jones, *supra* note 16; Molewa Rhino Poaching Statement, *supra* note 132.

<sup>209</sup> See, e.g., Merten, *supra* note 19; Slater-Jones, *supra* note 16; Molewa Rhino Poaching Statement, *supra* note 132.

<sup>210</sup> See Charl Du Plessis, *Poachers' Toxic Shock*, TIMES (S. Afr.), Sept. 8, 2011, <http://www.timeslive.co.za/local/2011/09/08/rhino-poachers-toxic-shock>.

<sup>211</sup> Rhino Rescue Project, Swaziland, ECOVOLUNTEER NETWORK, <http://greenvolunteers.com/rhino.htm> (last visited Apr. 6, 2013) (the rhino rescue project is a group of volunteers who aim to protect wildlife, particularly the white and black rhinoceros, from poaching).

more humane way to reduce poaching than dehorning.<sup>212</sup> The injected parasiticide would benefit the rhino by targeting ticks, but if it is ingested by humans, the poison can induce nausea, vomiting, and convulsions.<sup>213</sup> The parasiticide is also infused with a dye that is detectable by x-ray, enabling the injected horns to be easily identified in airports when being illegally transported.<sup>214</sup> This alternative, along with micro-chipping, has been implemented on at least ten rhinoceros so far this year; one rhinoceros died as a result of the operation.<sup>215</sup> Some skeptics believe these options will not deter poaching because it is unlikely that a sufficient number of rhinos will be caught to dehorn or inject with the dye.<sup>216</sup>

## B. South African Law Enforcement

Law enforcement is the key to decreasing poaching and conserving the white rhinoceros. Multiple law enforcement agencies are involved, including: the police, park rangers, the justice system, and specialized committees.

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<sup>212</sup> See Du Plessis, *supra* note 210.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*; see also Dube, *supra* note 67.

<sup>215</sup> See, e.g., Geoffrey York, *Anti-rhino-poaching Treatment Ends in Heartbreak in Africa*, GLOBE & MAIL (Can.), Feb. 9, 2012, <http://www.theglobeandmail.com/news/world/worldview/anti-rhino-poaching-treatment-ends-in-heartbreak-in-africa/article545097/> (reporting that Spencer, a 20 year old male rhino, died during a procedure to inject his horn with the pesticide, a dye, a micro-chip, and a tracking device. Spencer's heart stopped while he was still under the anesthetic. The veterinarian performing the procedure believed the death may have been because of Spencer's old age and has stated that, while Spencer's death is tragic, he will not discontinue injecting horns with pesticide and dye); Shaun Smillie, *Horn-chipping Operation Kicks Off*, STAR (S. Afr.), Feb. 9, 2012, at 3; Sheree Bega, *Poisoned Rhino Horn Plan Goes Awry*, STAR (A. Afr.), Feb. 11, 2012, at 7 (reporting that Spencer's death will not "be in vain" as veterinarians will continue to try this practice to stop poaching. The procedure Spencer underwent went "smoothly." The main concern was Spencer's age).

<sup>216</sup> See Dube, *supra* note 67.



## 1. South Africa's Police Force

South Africa's main police force is the South African Police Service (SAPS).<sup>217</sup> Minister Molewa considers SAPS to be at the forefront of the fight against poaching, commenting that SAPS continues to strengthen its biodiversity enforcement and monitoring capacities.<sup>218</sup> SAPS works closely with other, more specialized crime units, such as Hawks,<sup>219</sup> and INTERPOL's Wildlife Crime Working Group.<sup>220</sup>

Although SAPS officers are prohibited from commenting on rhinoceros poaching,<sup>221</sup> it is still apparent that SAPS is doing its job. There are frequent press releases about police arrests of suspected poachers and traffickers.<sup>222</sup> Reports indicate 165 arrests of suspected poachers in 2010, 232 arrests in 2011, 267 arrests in 2012, and 61 arrests as of March 2013; the large majority occurred in Kruger National Park.<sup>223</sup> Arrests at international airports also occur as

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<sup>217</sup> *Vision and Mission*, S. AFR. POLICE SERV., [http://www.saps.gov.za/org\\_profiles/vision\\_mission.htm](http://www.saps.gov.za/org_profiles/vision_mission.htm) (last visited Apr. 6, 2013) (SAPS responsibilities include preventing, combating and investigating crimes, protecting inhabitants of South Africa, upholding and enforcing the law, ensuring criminals are brought to justice, and participating in efforts to address the causes of crime).

<sup>218</sup> See Molewa Press Release on Poaching Scourge, *supra* note 19.

<sup>219</sup> See *id.*; Slater-Jones, *supra* note 16 (the Hawks are a specialized organized crime unit considered to be the leading police agency in the fight against rhino poaching).

<sup>220</sup> See Molewa Press Release on Poaching Scourge, *supra* note 19. The Wildlife Crime Working Group is a part of INTERPOL focusing its expertise and experience on the poaching, trafficking, or possession of legally protected flora and fauna, like the white rhino. It is the international police authority for enforcing CITES and created a practical guide explaining the operations of both INTERPOL and CITES and making specific recommendations regarding the cooperation between them. *Environmental Crime Committee*, INTERPOL <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-Crime-Committee/Wildlife-Crime-Working-Group> (last visited Apr. 6, 2013).

<sup>221</sup> See Mandla Khoza & Masoka Dube, *Comment on Rhino Poaching Restricted*, STAR (S. Afr.), Sept. 12, 2011, at 6, <http://www.iol.co.za/the-star/comment-on-rhino-poaching-restricted-1.1135346#UUxhQIVpfC4> (SAPS Commissioner banned all officers, provincial and regional, from commenting on rhino poaching incidents).

<sup>222</sup> See sources cited *infra* notes 224-25.

<sup>223</sup> See *Rhino Poaching Arrests Up in South Africa*, UPI.COM (Mar. 22, 2012, 9:42 PM), [http://www.upi.com/Science\\_News/2012/03/22/Rhino-poaching-](http://www.upi.com/Science_News/2012/03/22/Rhino-poaching-)

customs officers in South Africa work closely with SAPS and the Hawks to thwart international smuggling.<sup>224</sup> A manager at OR Tambo International Airport stated that airports “have a role to play in maximizing security to prevent criminal activities in and out of the country.”<sup>225</sup> SAPS has even licensed private game farmers to carry semi-automatic weapons in hopes that they will assist SAPS in catching the rhino poachers.<sup>226</sup> In addition, police often offer rewards for information leading to the arrest of poachers.<sup>227</sup> Finally, SAPS is also working closely with the National Joints Operation (NatJoints), which created a special committee and elevated rhino poaching to the highest level of security management.<sup>228</sup>

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[arrests-up-in-South-Africa/UPI-87401332466959/](http://arrests-up-in-South-Africa/UPI-87401332466959/); *South Africa: Over 200 Alleged Rhino Poachers Arrested*, BUANEWS (Nov. 3, 2011), <http://allafrica.com/stories/201111040112.html>; *Update on Rhino Poaching Statistics*, *supra* note 29; *Vietnamese Man Arrested for Illegally Possessing Rhino Horns*, XINHUA NEWS AGENCY (China) (Apr. 23, 2012), <http://english.cri.cn/6966/2012/04/24/3123s695120.htm> (in 2012 a Vietnamese man was found and arrested in OR International Airport with millions of rand worth of rhino horn).

<sup>224</sup> E.g., Press Release, Joint Statement by the SARS and Crime Line, Another Blow for Rhino Syndicate (Nov. 4, 2011), <http://allafrica.com/stories/201111080070.html>; see also *Frankfurt's Wildlife Sniffer Dogs Draw Interest from European Airports*, DEUTSCHE WELLE (Ger.) (Sept. 8, 2011), <http://www.dw.de/frankfurts-wildlife-sniffer-dogs-draw-interest-from-european-airports/a-15359372> (explaining how dogs are used to protect endangered species from illegal international trade by sniffing out wildlife contraband in luggage at customs. The practice started in Frankfurt, Germany, and has since expanded to more European airports. This practice puts added pressure on smugglers engaged in illegal international trade of endangered species. Since its inception in Germany, the dogs have found over 250 illegally smuggled animals or animal products, including rhinoceros horns, causing seizures by officers to increase across Europe).

<sup>225</sup> *Airports Add Weight to Fight Against Poachers*, TIMES (Feb. 8, 2012, 12:23 AM), <http://www.timeslive.co.za/business/2012/02/08/airports-add-weight-to-fight-against-poachers>.

<sup>226</sup> See Wyndham Hartley, *Semi-automatic Arms to Fight Rhino Poachers*, BUS. DAY (Sept. 23, 2011, 12:00 AM), <http://www.bdlive.co.za/articles/2011/09/23/semi-automatic-arms-to-fight-rhino-poachers>.

<sup>227</sup> See *Rhino Poaching: A R500,000 Reward Offered for Information*, BIZCOMMUNITY.COM (Feb. 13, 2012), <http://m.bizcommunity.com/Article/196/507/70706.html>.

<sup>228</sup> See Molewa Press Release on Poaching Scourge, *supra* note 19.

## 2. South Africa's National Park Rangers

The national park rangers and officers are also integral players in law enforcement. To help combat poachers, South Africa has increased its number of park rangers. For example, within the last year approximately fifty-seven rangers have been added to Kruger National Park alone.<sup>229</sup> As recently as August 2012, South Africa National Parks (SANParks) inaugurated 150 new rangers<sup>230</sup> and implemented new “hi-tech” techniques to fight poachers.<sup>231</sup> Minister Molewa commended the rangers’ work and innovative methods in fighting poaching.<sup>232</sup> In addition, a volunteer ranger organization called “Honorary Rangers” donated millions of dollars of anti-poaching equipment, including compasses, camouflage equipment, and first-aid kits, to rangers in Kruger National Park.<sup>233</sup> The park rangers “risk their lives daily to protect wildlife from poachers and traders.”<sup>234</sup> In fact, while tracking poachers with a team of other rangers, one ranger was mistakenly shot and killed after the group

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<sup>229</sup> *See id.*

<sup>230</sup> *See SANParks Step Up the Fight Against Poaching in Kruger National Park*, BIZCOMMUNITY.COM (Aug 2, 2012), <http://www.bizcommunity.com/Article/196/507/79467.html>.

<sup>231</sup> *See Going to War For Rhinos*, INDEP. ON SAT. (S. Afr.), July 28, 2012, at 7 (outlining several new “hi-tech” techniques rangers are now using to track and catch poachers, including a rhino horn DNA database, unique dog tracking systems, and helicopters).

<sup>232</sup> *See* Molewa Press Release on Poaching Scourge, *supra* note 19.

<sup>233</sup> *See* Tony Carnie, *Kruger Rangers Kitted Out to Tackle Poachers*, MERCURY (S. Afr.), Nov. 15, 2011, at 5, <http://www.iol.co.za/mercury/kruger-rangers-kitted-out-to-tackle-poachers-1.1178315#UUxkPIVpfC4>.

<sup>234</sup> *WWF Calls for End to Rhino Poaching on World Rhino Day At Least 287 Rhinos Have Been Killed in South Africa as Crisis Escalates*, WORLD WILDLIFE FUND (Sept. 21, 2011), <http://worldwildlife.org/press-releases/wwf-calls-for-end-to-rhino-poaching-on-world-rhino-day> (internal quotations omitted).

split up.<sup>235</sup> In some countries, rangers are trained to kill poachers outright if caught.<sup>236</sup>

South African park rangers also receive special training from the WWF on how to handle a rhinoceros if found hornless.<sup>237</sup> The rangers are taught to avoid touching the animal and cordon off the area.<sup>238</sup> Additionally, they are taught to take a DNA sample from the rhino to use as forensic evidence to help find the poacher.<sup>239</sup> Recently, however, rangers have begun to strike over pay and terms of employment, creating concern for the rhinos under their care.<sup>240</sup>

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<sup>235</sup> *Ranger Mistaken for Poacher*, CAPE ARGUS (S.Afr.), Sept. 13, 2011, at 4; see also Gianluca Mezzofiore, *Kruger Park Rhino Poaching Wars: Policeman and Ranger Shot Dead After Radio Breakdown*, INT'L BUS. TIMES NEWS, Apr. 30, 2012, <http://www.ibtimes.co.uk/articles/335022/20120430/south-africa-kruger-park-rhinos-poaching.htm> (both police and rangers fighting against poaching have been accidentally shot).

<sup>236</sup> See Sian Powell, *Hunters Now the Hunted*, AUSTRALIAN, Dec. 30, 2011, at 9, <http://www.theaustralian.com.au/news/features/hunters-now-the-hunted/story-e6frg6z6-1226232815327> (explaining how park guards in the Indian state of Assam “hunt” rhino poachers and shoot to kill, regardless of whether they initiate the shooting or flee. The officers are given immunity from prosecution if they kill a suspected poacher in protected forests, so the state’s forests have become a “bloody battleground.” The officers believe they are simply performing their duties and that killing poachers is entirely legal. Additionally, they feel that they are keeping the community and tourists safe.); see also *Local Rhino Poachers Shot Dead*, AGENCIA DE INFORMACAO DE MOCAMBIQUE (Mozam.), Jan. 12, 2012, <http://allafrica.com/stories/201201130328.html> (recently rangers in Kruger National Park killed two suspected poachers during a shoot-out, but this is not the general practice in South Africa and the general manager of Kruger has stated that he regrets the deaths).

<sup>237</sup> See Maditla, *supra* note 125.

<sup>238</sup> See *id.*

<sup>239</sup> See *id.*

<sup>240</sup> See *Rhinos Threatened By SAF Ranger Strike*, VOICE OF AM. (Feb. 6, 2012), <http://www.voanews.com/content/rhinos-threatened-by-saf-ranger-strike-138848174/151697.html>; Tony Carnie, *Kruger Rangers Go On Strike*, MERCURY (S. Afr.), Feb. 2, 2012, at 3, <http://www.iol.co.za/mercury/kruger-rangers-to-go-on-strike-1.1225684> (stating that while the rangers are on strike, honorary rangers, police and the South African National Defense Force will be filling their place in the parks).

### 3. South Africa's National Prosecuting Authority

Another pivotal player is the National Prosecuting Authority of South Africa (NPA), the single prosecuting authority in South Africa.<sup>241</sup> It is the NPA's sole responsibility to prosecute poachers in custody. Poachers can be charged with illegally hunting the white rhinoceros in a national park, violating the Biodiversity Act, possessing unlicensed fire-arms and ammunition, and illegal trade and trafficking.<sup>242</sup> Additionally, the NPA is receiving special training from the WWF to inform the prosecutors on conservation matters.<sup>243</sup> The NPA's understanding is important to ensure that poachers cannot evade prosecution and to aid the justice system in determining sentences.<sup>244</sup> Since this training has commenced, guilty verdicts have increased noticeably and prison sentences frequently reach up to eight years and, in one instance, even twenty-five years.<sup>245</sup> However, despite the hard work of the NPA, many people feel that the prosecution rates are too low and the cases are taking too long, thereby failing to convey a "tough on poaching" message.<sup>246</sup>

### 4. South Africa's National Anti-Poaching Committee

One final law enforcement player is the National Anti-poaching Committee, which was created to improve communications and coordination among poaching law enforcement.<sup>247</sup> The Committee agreed on four initial priorities to help combat rhino poaching.<sup>248</sup> First, the Committee wants to create a national hotline

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<sup>241</sup> S. AFR. CONST., 1996 § 179.

<sup>242</sup> See, e.g., *South Africa: Over 200 Alleged Rhino Poachers Arrested*, *supra* note 223.

<sup>243</sup> See Maditla, *supra* note 125.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*; see also Erin Conway-Smith, *South Africa: Rhino Poachers from Mozambique Jailed for 25 Years*, GLOBAL POST (Feb. 1, 2012), <http://www.globalpost.com/dispatch/news/regions/africa/south-africa/120201/south-africa-rhino-poaching-mozambique-poachers-sentenced-25-years>.

<sup>246</sup> See Molewa Press Release on Poaching Scourge, *supra* note 19.

<sup>247</sup> See *National Anti-poaching Committee Established*, MAIL & GUARDIAN (S. Afr.), Aug. 23, 2010, <http://mg.co.za/article/2010-08-23-national-antipoaching-committee-established>.

<sup>248</sup> See *id.*

for reporting rhino poaching.<sup>249</sup> Second, the Committee plans on coordinating intelligence from all groups involved in fighting rhino poaching.<sup>250</sup> Third, the Committee hopes to organize a national fundraising campaign.<sup>251</sup> Fourth, the Committee wants to raise poaching awareness among the people of South Africa.<sup>252</sup> The Committee's efforts are ongoing.

### C. Current Vietnamese Law

While South Africa is taking great strides to comply with CITES and to deter rhino poaching, Vietnam has a long way to go. Recently, poaching forced Vietnam's native rhinoceros, the Javan rhino, into extinction.<sup>253</sup> The WWF accuses the Vietnamese government of failing to control poaching due to insufficient political support for endangered species conservation.<sup>254</sup> The WWF stated that "significant improvements need to be made in law enforcement and protected area management in Vietnam."<sup>255</sup> The WWF also ranked Vietnam as the worst Asian or African country for wildlife crimes, giving it a "red score" for rhinoceros and tigers.<sup>256</sup>

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<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *National Anti-poaching Committee Established*, *supra* note 247.

<sup>253</sup> See Ives, *supra* note 70.

<sup>254</sup> See *id.*

<sup>255</sup> See *id.* (internal quotations omitted).

<sup>256</sup> See *Vietnam at Bottom of WWF Species-Protection Report*, GUARDIAN, July 22, 2012, <http://www.guardian.co.uk/world/feedarticle/10348872>; *Vietnam Accused Over Rhino Poaching*, DAILY TELEGRAPH (U.K.), July 23, 2012, at 28 (describing the WWF's African and Asian country ranking system reflecting progress in each country's protection of endangered species. The WWF ranked 23 countries, giving them scores of green for good, yellow for moderate, and red for poor); *Countries Get Failing Grades on Illegal Wildlife Trade Enforcement*, WORLD WILDLIFE FUND, July 23, 2012, <http://worldwildlife.org/press-releases/countries-get-failing-grades-on-illegal-wildlife-trade-enforcement-wwf-analysis> (reporting that illegal wildlife trading persists in all 23 countries, but the ranking system was designed to differentiate between countries that are actively working to stop the trade and countries "where current efforts are entirely inadequate").

As a comparison, China, another area of high rhino horn trafficking,<sup>257</sup> has made considerable efforts to decrease the international trade in endangered species.<sup>258</sup> Through confiscation of weapons, tougher penalties, and awareness campaigns, China has reduced the number of criminal cases involving trafficking of endangered species.<sup>259</sup> In January 2012, China's State Forestry Administration began a crack-down on Chinese auction houses to ensure that they are following Chinese wildlife laws and regulations and to emphasize that they are subject to the trade ban on endangered species.<sup>260</sup> Although Vietnam could benefit from Chinese-like law enforcement efforts, Vietnam has taken steps to raise public awareness through a campaign providing scientific research showing the need to protect the rhino.<sup>261</sup>

In 2007, the CITES Scientific and Management Authorities of Vietnam conducted a voluntary assessment of Vietnam's wildlife trade policies, both domestic and international, to identify strengths and weaknesses.<sup>262</sup> Vietnam recognized that it is an important

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<sup>257</sup> See Jessica Hatcher, Op-Ed., *Deadly Trade: Rhino Horn Poaching Surges*, TELEGRAPH (U.K.), Dec. 10, 2011, <http://www.telegraph.co.uk/earth/wildlife/8935724/Deadly-trade-rhino-horn-poaching-surges.html> (commenting on China as a main destination for poached rhino horns, which are used in traditional Chinese medicines. The Kenya Wildlife Service has noted a correlation between the influx in Chinese labor and poaching; there are about a million Chinese workers now in Africa. The author went on safari with many wealthy and influential Chinese figures—a safari meant to educate. The article is optimistic about China's efforts to stop the illegal trade of both rhinoceros horns and elephant tusks and the author hopes the increase of Chinese laborers and tourists to Africa will help spread the word about the evils of poaching).

<sup>258</sup> See *Wildlife Smuggling Becomes Rarer But Has Not Gone Extinct*, CHINA DAILY, Oct. 20, 2011.

<sup>259</sup> See *id.*

<sup>260</sup> See *China Applies Trade Ban to Wildlife Auctions*, INT'L FUND FOR ANIMAL WELFARE (Jan. 11, 2012), <http://www.ifaw.org/africa/news/china-applies-trade-ban-wildlife-auctions>.

<sup>261</sup> See VN, *South Africa Act on Wildlife Protection*, VIET. NEWS AGENCY (Sept. 29, 2011, 8:51 PM), <http://en.vietnamplus.vn/Home/VN-South-Africa-act-on-wildlife-protection/20119/21283.vnplus>.

<sup>262</sup> See generally CITES SCIENTIFIC AUTH. OF VIET. & CITES MGMT. AUTH. OF VIET., REPORT ON THE REVIEW OF VIETNAM'S WILDLIFE TRADE POLICY (2008) [hereinafter VIETNAM WILDLIFE TRADE POLICY REPORT],

location for wildlife trade, both legal and illegal.<sup>263</sup> Vietnam also recognized the importance of biodiversity, which, due to degradation and deforestation, has become a critical issue.<sup>264</sup> Additionally, Vietnam acknowledged its peoples' traditional consumption of wildlife, much of which is legal through the CITES permit program, but which has also fueled the well documented and expanding illegal trade market.<sup>265</sup> As a result of this acknowledgement, after Vietnam became a CITES member in 1994, it created a National Action Plan aimed at promoting the sustainability of natural resources, improving the economy, strictly controlling trade in endangered species, and enhancing the efficiency of the agencies which control illegal wildlife trade.<sup>266</sup>

After Vietnam joined CITES in 1994, the government passed several decrees concerning illegal trade in endangered species; two of which focus on international trade.<sup>267</sup> The first, Decree No. 11/2002/ND-CP, was passed as the principal legal basis for implementing CITES and providing training for enforcement.<sup>268</sup> However, due to its hasty passage, the law overlapped with a Vietnamese Customs law, creating confusion regarding the proper procedure when species are listed under both laws and resulting in no fines being issued for violations of illegal trading under CITES.<sup>269</sup> Therefore, Decree No. 82/2006/ND-CP was passed to remedy the problems of Decree No. 11/2002/ND-CP, but it had problems of its own.<sup>270</sup> It failed to effectively manage punishments for violations or craft proper disposal techniques for confiscated specimens.<sup>271</sup>

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[http://www.cites.org/common/prog/policy/Vietnam\\_wildlife\\_trade\\_policy\\_review.pdf](http://www.cites.org/common/prog/policy/Vietnam_wildlife_trade_policy_review.pdf).

<sup>263</sup> See *id.* at 1.

<sup>264</sup> See *id.* at 8.

<sup>265</sup> See *id.* at 10-13 (commenting that the quantity of wildlife provided for the Vietnamese trading market is over 1 million individual animals per year).

<sup>266</sup> See *id.* at 19.

<sup>267</sup> See VIETNAM WILDLIFE TRADE POLICY REPORT, *supra* note 262, at 28.

<sup>268</sup> See *id.* at 29.

<sup>269</sup> See *id.*

<sup>270</sup> See *id.* at 30-31.

<sup>271</sup> See *id.*



Overall, these actions have failed to meet Vietnam's conservation goals and there are still many problem areas concerning Vietnam's wildlife trade policy. One explanation might be Vietnam's attempt to address too many issues at once, making implementation much more difficult.<sup>272</sup> While there were training programs and education about certain endangered species, they did not focus on the white rhinoceros, or any rhinoceros for that matter,<sup>273</sup> and local citizens were provided with little guidance on endangered species.<sup>274</sup> Furthermore, insufficient government funding has made implementation difficult and has limited law enforcement agencies, resulting in policies which have had very little impact on the illegal trade of endangered species.<sup>275</sup>

Despite the ineffective implementation, Vietnam's efforts have had a few positive effects. For example, conservation policies have created over 120 new special use forests, the decreased deforestation, and decreased damage to marine ecosystems.<sup>276</sup> However, Vietnam can do much more to effectively manage the illegal trade in wildlife. For example, confusion still exists because of overlapping policies among different agencies, and loopholes in endangered species legislation make it easy to bypass current laws.<sup>277</sup> So easy, in fact, that some restaurants continue selling prohibited rhinoceros horns.<sup>278</sup>

Moreover, the rhino horn trade has historically provided jobs and income for many of Vietnam's poor.<sup>279</sup> Even if the trade began legally and has since become illegal, most traders continue to work because it is so hard for them to find another means of income.<sup>280</sup> Without the support and cooperation of traders, policies attempting

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32. <sup>272</sup> See VIETNAM WILDLIFE TRADE POLICY REPORT, *supra* note 262, at

<sup>273</sup> See *id.* at 26.

<sup>274</sup> See *id.* at 32.

<sup>275</sup> See *id.* at 26.

<sup>276</sup> See *id.* at 34.

35. <sup>277</sup> See VIETNAM WILDLIFE TRADE POLICY REPORT, *supra* note 262, at

<sup>278</sup> See *id.* at 43.

<sup>279</sup> See *id.* at 45.

<sup>280</sup> See *id.*

to control the illegal trade of wildlife tend to be ineffective. The Vietnamese wildlife trade law have not yet met the goals of CITES.<sup>281</sup>

#### D. Vietnamese Law Enforcement

Despite campaigns to raise awareness and the secretary of the Vietnamese embassy in South Africa's declaration that the rhino horn trade is the "shame of [the] nation,"<sup>282</sup> Vietnamese law enforcement continues to be insufficient—a key area where it cannot afford to be lax if it wishes to tackle the problem of rhino poaching. Vietnam's Ministry of Natural Resources and Environment has taken notice of the problem.<sup>283</sup> Le Xuan Canh, the director of the Institute of Ecology and Biological Resources, has informed the Vietnamese government that its poaching problem is due to illegal trade in endangered species, deforestation, and lack of wildlife protection.<sup>284</sup>

Yet, nothing seems to be happening to correct the problem. Vietnam has reported that its law enforcement controls only five to ten percent of the total illegal wildlife trade.<sup>285</sup> Decree No. 139/2004/ND-CP contains provisions for punishing those involved in the illegal trade of endangered species, making the crime a high level offense.<sup>286</sup> However, effective law enforcement has been difficult because the Decree was developed primarily to combat illegal trade in wild flora, which differs substantially from trade in fauna because of the size and mobility of some animals.<sup>287</sup> Additionally, law enforcement personnel have received insufficient

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<sup>281</sup> *See id.*

<sup>282</sup> *See Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horn*, *supra* note 60.

<sup>283</sup> *See Fewer Than 50 Tigers Still Left in the Wild*, VIET. MINISTRY OF NATURAL RES. & ENV'T (Dec. 30, 2011), <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CateID=58&ID=112249&Code=K5LF112249>.

<sup>284</sup> *See id.*

<sup>285</sup> *See VIETNAM WILDLIFE TRADE POLICY REPORT*, *supra* note 262, at 14.

<sup>286</sup> *See id.* at 58 (noting that wildlife crime is generally punishable by fine, but that punishment varies because it is hard to calculate the fine according to species. Some species weigh more or are more endangered than others. This creates loopholes in the criminal law).

<sup>287</sup> *See id.*

information concerning the illegal trade and the CITES requirements, harming implementation efforts.<sup>288</sup>

In 2010, Vietnam hosted South African representatives involved with monitoring the rhinos and enforcing poaching laws to discuss Vietnam's efforts to control the illegal rhino trade.<sup>289</sup> The goal of the meeting was to improve collaboration between the two nations.<sup>290</sup> Not only is there a lack of enforcement in Vietnam, but there is a lack of a system to enforce; there is no legal system in place to register and track already owned horns, which allows legally obtained horns to more easily enter the illegal trade market.<sup>291</sup> Hopefully, the collaboration between South Africa and Vietnam will lead to a substantial reduction of rhino poaching.

#### E. How Poachers Are Getting Around the Laws

Despite poaching laws and law enforcement efforts, poachers continue to victimize rhinoceros, and the number of poachers is not declining.<sup>292</sup> Like other organized crime, rhino poaching and horn trafficking has become syndicated.<sup>293</sup> There are several known gangs and syndicates; the more sophisticated ones use helicopters, high-powered firearms, and new technology to avoid detection while hunting.<sup>294</sup> The syndicates are largely foreign, but some are suspected of working with South African citizens, even law enforcement officers and government employees.<sup>295</sup> Many of the syndicates shoot

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<sup>288</sup> See *id.* at 32.

<sup>289</sup> See *South African Delegates Visit Vietnam to Address Illegal Rhino Horn Trade*, TRAFFIC (Oct. 20, 2010) [hereinafter *South African Delegates Visit Vietnam*], <http://www.traffic.org/home/2010/10/20/south-african-delegates-visit-viet-nam-to-address-illegal-rh.html>.

<sup>290</sup> See *id.*

<sup>291</sup> See *id.*

<sup>292</sup> See *supra* Part II.A.

<sup>293</sup> See sources cited *infra* notes 295-98.

<sup>294</sup> See Slater-Jones, *supra* note 16.

<sup>295</sup> See *Zanu-PF, Aliens Colluding in Poaching Syndicates*, ZIM. STANDARD, Oct. 23, 2011, <http://allafrica.com/stories/201110240648.html>; see also Tendai Rupapa, *Rhino Horn Case Takes New Twist*, HERALD (Zim.), Jan. 11, 2012, [http://www.herald.co.zw/index.php?option=com\\_content&view=article&id=31187#.UUxujoVpfC4](http://www.herald.co.zw/index.php?option=com_content&view=article&id=31187#.UUxujoVpfC4) (explaining how three rhino poachers suspected of murdering a game ranger were caught with illegal rhino horns in the car of Zimbabwe's Local

the rhinos “legally” by abusing the permit system.<sup>296</sup> For example, a recent Thai syndicate was suspected of using strippers and prostitutes posing as hunters to obtain permits to hunt white rhinos.<sup>297</sup>

Once a horn is obtained,<sup>298</sup> the syndicates have a number of methods they use to smuggle it to its final destination. There are established smuggling routes, which are shared with smugglers of other animals and changed often to avoid detection.<sup>299</sup> The smugglers hide the rhino horns in containers, such as large “statues” or luggage, or ship them in bulk consignments by boat.<sup>300</sup> More recently, smugglers have been using the internet, selling the horns online and mailing them disguised as art or antiques.<sup>301</sup> In addition, smugglers

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Government, Rural and Urban Development Deputy Minister. The Deputy Minister denies involvement, saying that he sold the vehicle and has had nothing to do with the car since).

<sup>296</sup> See Omphitlhetse Mooki, *Suspected Thai Rhino Poaching Kingpin Fights for Bail*, PRETORIA NEWS (S. Afr.), Oct. 27, 2011, at 4.

<sup>297</sup> See *id.*

<sup>298</sup> See *Rhino Horn Thieves Gas Paris Museum Guards*, TELEGRAPH (U.K.), Dec. 7, 2011, <http://www.telegraph.co.uk/news/worldnews/europe/france/8939250/Rhino-horn-thieves-gas-Paris-museum-guards.html> (rhino horns are most frequently obtained by hunting the rhino, as described throughout this comment. However, recently, a pair of thieves stole a white rhino horn from a hunting and nature museum in Paris, France. Zoos and museums across Europe have been alert to possible thefts of rhino horns for some time, as this most recent robbery is not the only one. Rhino horns were stolen from at least three other French museums in 2011, as well as from a taxidermist in Vienna); *50 Overseas Museums Holding Rhino Heads Have Been Burgled*, CAPE TIMES (S. Afr.), Jan. 31, 2012, at 3; *Rhinos Given Fake Horns*, N. Z. HERALD, Dec. 22, 2011, [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10774696](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10774696) (in response to the rhino horn thefts from museums, curators in a Swiss museum have replaced the horns of its rhinos on display with fake horns); Michael McCarthy, *British Zoos Put on Alert Over Rising Threat of Rhino Rustlers*, INDEP. (U.K.), Jan. 30, 2012, <http://www.independent.co.uk/environment/nature/british-zoos-put-on-alert-over-rising-threat-of-rhino-rustlers-6296572.html> (noting that zoos have also been warned to prepare for potential targeting by rhino poachers and other criminals looking to steal and sell their rhino horns on the black market).

<sup>299</sup> See Candice Bailey & Shaun Smillie, *Record Rhino Horn Haul: 33 of Them Seized in ‘Scrap Plastic’ Shipment in Hong Kong*, STAR (S. Afr.), Nov. 16, 2011, at 1, <http://www.iol.co.za/news/crime-courts/record-rhino-horn-haul-1.1179722#.UUxvzIVpfC4>.

<sup>300</sup> See *id.*; *Wildlife in Their CITES*, METRO (U.K.), Oct. 5, 2011, at 20.

<sup>301</sup> See *Smuggling of Rhino Parts Goes Online*, CHANNEL NEWSASIA (China), Sept. 5, 2011, <http://wildsingaporenews.blogspot.com/2011/09/smuggling-of->

have started making fake horns in order to mark-up the prices on real horns.<sup>302</sup> However, due to the increasing efforts of law enforcement personnel, many syndicate rings have been busted sending several high-profile smugglers to trial.<sup>303</sup> For example, the Groenewald Gang, started by a couple that operates a safari touring company, recently appeared in court facing hundreds of charges under several laws.<sup>304</sup>

For the most part, law enforcement personnel are fighting on behalf of the white rhinoceros to end poaching. Unfortunately, some officers and park rangers are also involved in poaching, largely because of the great monetary benefits.<sup>305</sup> South African police, politicians, and government officials have taken bribes from the poaching syndicates or aided them in some other way.<sup>306</sup> One Vietnamese diplomat was even caught on tape making an illegal rhino horn purchase.<sup>307</sup> Permit issuing authorities have also been suspected of aiding poaching by issuing questionable permits.<sup>308</sup> Additionally, the South African government has kept stockpiles of rhino horns, which have been audited and are reported to be secretly held in safe keeping.<sup>309</sup> However, the Minister Molewa's Department's booklet entitled "National Strategy for the Safety and Security of Rhinoceros

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[rhino-parts-goes-online.html](#); Tony Carnie, *Rhino Horn 'For Sale' Online as Prices Soar: Website Advertises Illegally Amid Spike in Poaching*, PRETORIA NEWS (S. Afr.), Feb. 21, 2012, at 3.

<sup>302</sup> See Tony Carnie, *Fake Rhino Horn Pushes Up Price of the Real Thing*, CAPE TIMES (S. Afr.), July 27, 2012, at 10.

<sup>303</sup> See Sheree Bega, *Trial Delay is a Danger to Wildlife Say Activists*, STAR (S. Afr.), Oct. 1, 2011, at 4 (commenting on the trial of suspected rhino horn poaching syndicate Dawie Groenewald and the rest of his gang, called the "Mafia of Musina"); Mooki, *supra* note 296 (commenting on the denial of bail by a South African judge for a Thai kingpin, who used strippers and prostitutes posing as hunters to gain hunting permits so he could shoot rhinoceros legally. He was denied bail because he was deemed a flight risk).

<sup>304</sup> See *Crucial Rhino Poaching Case Delayed Again*, WORLD WILDLIFE FUND (Apr. 25, 2012), [http://www.wwf.org.uk/what\\_we\\_do/press\\_centre/?unewsid=5924](http://www.wwf.org.uk/what_we_do/press_centre/?unewsid=5924).

<sup>305</sup> See Slater-Jones, *supra* note 16.

<sup>306</sup> See *id.*

<sup>307</sup> See *South African Delegates Visit Vietnam*, *supra* note 289.

<sup>308</sup> See Yolandi Groenewald, *Wildlife Officials' Link to Hunting*, MAIL & GUARDIAN (S. Afr.), Oct. 21, 2011, <http://mg.co.za/article/2011-10-21-wildlife-officials-link-to-hunting>.

<sup>309</sup> See Merten, *supra* note 19.

Populations in South Africa” says these stockpiles may be depleting as well, implying that some officials are stealing and selling the horns.<sup>310</sup>

So many park rangers and game preserve employees have been involved in poaching that South Africans have coined the involvement “khaki-colored crime.”<sup>311</sup> All levels of rangers have been implicated, many have been arrested,<sup>312</sup> and some have been criminally charged.<sup>313</sup> Additionally, veterinarians have been implicated in aiding the poaching syndicates by providing them with immobilizing drugs only available to vets.<sup>314</sup> In one notable instance, a South African court convicted a veterinarian of aiding rhino poaching.<sup>315</sup> However, instead of a court sentence, the South African Veterinary Council sentenced the vet to six months suspension and a fine.<sup>316</sup> This “puny” sentence caused an outcry in the environmental conservation community.<sup>317</sup> Those responsible for protecting the

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<sup>310</sup> See *id.*

<sup>311</sup> See Melanie Gosling, *Rhino Poaching's Inside Job*, MERCURY (S. Afr.), Dec. 14, 2011, at 5.

<sup>312</sup> See, e.g., *South African Game Park Officials Arrested for Rhino Poaching*, BNO NEWS (S. Afr.), Feb. 29, 2012 (reporting that four parks officials, including one ranger and two traffic cops, were arrested under suspicion of involvement in poaching activities); Colleen Dardagan, *Ranger Awaits Trial Behind Bars*, MERCURY (S. Afr.), July 24, 2012, at 3, <http://www.iol.co.za/mercury/ranger-awaits-trial-behind-bars-1.1348162> (reporting that three rangers suspected of being involved in rhino poaching activities were caught in a trap laid by other park rangers).

<sup>313</sup> See Comins, *supra* note 35 (reporting on park staff, rangers, and senior officials' involvement in rhino poaching and the current investigations concerning that involvement, as well as recent criminal charges brought against two rangers); Sydney Masinga, *Top Park Official Accused of Poaching*, MAIL & GUARDIAN (S. Afr.), Sept. 10, 2010, <http://mg.co.za/article/2010-09-10-top-parks-official-accused-of-poaching> (reporting on the accusation of two senior national park officials' involvement in rhino poaching).

<sup>314</sup> See Gosling, *supra* note 311; Fiona Macleod, *Vets Charged for Illegal Use of Tranquilizers*, MAIL & GUARDIAN (S. Afr.), Mar. 2, 2012, <http://mg.co.za/article/2012-03-02-vets-charged-for-illegal-use-of-tranquillisers> (reporting that three veterinarians appeared in court relating to charges of illegal use of M99, a drug commonly used by poachers).

<sup>315</sup> Shaun Smillie, *Outrage Over Vet's 'Puny' Sentence*, STAR (S. Afr.), Feb. 9, 2012, at 6, <http://www.iol.co.za/news/south-africa/gauteng/outrage-over-vet-s-puny-sentence-1.1230448>.

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

white rhino often help the poachers instead, making the fight against poaching even more difficult.

#### F. The Response

Clearly rhinoceros poaching is a problem. Unfortunately, the problem only seems to be growing. While South Africa is taking great strides to fight the poachers and curb the supply, the demand in countries is soaring; and Vietnam, for one, is doing little to control it.<sup>318</sup> If the demand is great and prices for rhinoceros horns are high, the poaching problem will only persist. Additionally, a major roadblock in the fight to stop poaching is the involvement of people “on the inside.”<sup>319</sup> Fortunately, South Africa and Vietnam have begun to take steps to work together to address the problem, as has the larger international community.

To put an end to poaching, South Africa must first tackle its “khaki-colored crime” problem and suppress insider assistance to poaching syndicates. The specialized South African police force, known as the Hawks, has commented that they will continue to hunt those insiders despite the challenges of being repeatedly “stymied” by them.<sup>320</sup> Additionally, retired park rangers, who are viewed as independent from their former parks and therefore less corruptible, are helping law enforcement officials generate new and effective ways to defeat poachers.<sup>321</sup> Park officials have also encouraged bordering communities to help arrest poachers.<sup>322</sup> Minister Molewa has also discussed cross-border law enforcement between SAPS and their counter-part in Mozambique.<sup>323</sup>

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<sup>318</sup> See *supra* Part IV.B & D.

<sup>319</sup> See *supra* Part IV.E.

<sup>320</sup> See Slater-Jones, *supra* note 16.

<sup>321</sup> See Lyse Comins, *Conservation Veterans Enter the Fray: Former Rangers to Tackle Poaching, Advise Officials*, INDEP. ON SAT. (S. Afr.), Nov. 19, 2011 at 5.

<sup>322</sup> See *Locals Help Kruger Park Catch Poachers*, STAR (S. Afr.), Apr. 25, 2012, at 13, <http://www.iol.co.za/the-star/locals-help-kruger-park-catch-poachers-1.1283200#.UUx3YIVpfC4> (explaining how members of Matsulu, a community that borders the south-west area of Kruger Park, helped officials arrest a suspected rhinoceros poacher).

<sup>323</sup> See John Yeld, *Global Boost in Rhino-Poaching Battle SMS the Argus: China, Vietnam Set to Sign Agreements*, CAPE ARGUS (S. Afr.), Jan. 17, 2012, at 6.

In response to the alarming number of rhinoceros poached in 2012, Minister Molewa called all of South Africa to action.<sup>324</sup> The Minister stated: “It is clear that this is an organized crime of the highest degree . . . [and] we need inputs and actions from all South Africans.”<sup>325</sup> The minister called on rhino anti-poaching organizations for input, plans to add 150 more park rangers to the existing 500 in Kruger National Park, aims to deploy conservation specialists at key places of entry for poachers, especially sea ports and airports, and intends to continue working closely with Vietnam.<sup>326</sup>

South Africa is also taking steps to curb the demand for rhinoceros horn in Vietnam. In September 2011, South Africa hosted Vietnamese delegates to address the growing demand for rhino horns, and the parties drafted a memorandum of understanding (MoU) to work together to prevent rhino poaching and preserve this endangered species.<sup>327</sup> The MoU seeks to disrupt the rhino horn trade through cooperation between Asian and African governments and cooperation among law enforcement during investigations, among prosecutors during trials, and among supervisors during legal hunting.<sup>328</sup> The delegates are CITES members, including Vietnam’s Deputy Director of the General Department of Forestry, Ha Cong Tuan, and South Africa’s Deputy Director of biodiversity and natural conservation, Fundisile Mketeni.<sup>329</sup> The delegates praised Vietnam’s participation, acknowledging the importance of Vietnam’s cooperation and effective implementation of CITES in order to win this fight.<sup>330</sup> This 2010 meeting, arranged by IUCN<sup>331</sup> and

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<sup>324</sup> See Shaun Smillie, ‘YOU Are Needed to Join Fight Against Rhino Poachers’: Minister Calls on All South Africans to Help in Stopping the Slaughter of Endangered Species, STAR (S. Afr.), Jan. 16, 2012, <http://www.iol.co.za/the-star/you-are-needed-to-join-fight-against-rhino-poachers-1.1213120>.

<sup>325</sup> See *id.*

<sup>326</sup> See *id.*

<sup>327</sup> See *WWF Calls for End to Rhino Poaching*, *supra* note 58; see also *Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horn*, *supra* note 60; Yeld, *supra* note 323.

<sup>328</sup> See *WWF Calls for End to Rhino Poaching*, *supra* note 58; see also *Vietnam, South Africa Sign MOU on Anti-Smuggling of Rhino Horn*, *supra* note 60; Yeld, *supra* note 323.

<sup>329</sup> See *VN, South Africa Act on Wildlife Protection*, *supra* note 261.

<sup>330</sup> See *id.*



TRAFFIC,<sup>332</sup> inspired South Africa and Vietnam to meet once again in 2012.<sup>333</sup>

On August 17, 2012, Deputy International Relations and Cooperation Minister Ebrahim Ebrahim and Vietnam's Deputy Foreign Affairs Minister Le Luong Minh held a second meeting in South Africa concerning the MoU.<sup>334</sup> The delegates expressed great

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<sup>331</sup> IUCN, <http://www.iucn.org/> (last visited Jan. 3, 2012) (IUCN is a global network which provides frameworks for planning, implementing, monitoring, and evaluating conservation work done by its members. Every four years, IUCN drafts new programs that provide members with an analysis report on the current state of biodiversity. IUCN's key priorities are conserving biodiversity, climate change, sustainable energy, human well-being, and a green economy).

<sup>332</sup> *Wildlife Trade News*, TRAFFIC.ORG, <http://www.traffic.org/> (last visited Apr. 6, 2013) (TRAFFIC's mission is to "ensure that trade in wild plants and animals is not a threat to the conservation of nature." The organization partners with the WWF and the IUCN, was established in 1976, and works in over 100 countries worldwide. TRAFFIC also works closely with the Secretariat of CITES. TRAFFIC has a five part program for ensuring conservation of species: (1) The Setting—the program looks at wildlife trade and how it fits in with wider environmental concerns, people, and the economy; (2) The Strategy—the program is built around changing attitudes and behaviors by working with governments and providing incentives to implement and enforce more effective policies and legislation; (3) The Results—TRAFFIC tracks results in five key areas: early warnings, flagship species in trade (like the white rhino), resource security and wildlife trade, wildlife trade routes, and rapid response and innovation; (4) The Core Competencies—TRAFFIC uses its expertise, in research, analysis, proposing solutions, advocacy and awareness, and supporting remedial action to carry out its mission; and (5) The Partnerships—drawing upon the expertise of its partnerships with WWF and IUCN, helps TRAFFIC to deliver more effective conservation action plans.); *see also* Sheree Bega, *Rhino Report Gives Some Hope*, STAR S. Afr.), Aug. 25, 2012, at 8 (reporting on TRAFFIC's rhino and elephant program leader Tom Milliken's new report "The South Africa-Vietnam Rhino Horn Trade Nexus: A Deadly Combination of Institutional Lapses, Corrupt Wildlife Industry Professionals and Asian Crime Syndicates." Milliken worked on compiling the report over a three year period. The report documents corrupt South African wildlife and government officials. Milliken's own eye-witness reports on Vietnamese usage of rhino horns, Vietnam's denial over their role in the trade, growing arrest rates, increased awareness, and trafficking).

<sup>333</sup> *See WWF Calls for End to Rhino Poaching*, *supra* note 58.

<sup>334</sup> *See S.A., Vietnam Discussing Poaching*, S. AFR. PRESS ASS'N, Aug. 17, 2012; Sue Blaine, *SA Set to Sign Deal with Vietnam on Rhino*, BUS. DAY (S. Afr.), Aug. 20, 2012, <http://www.bdlive.co.za/national/science/2012/08/20/sa-set-to-sign-deal-with-vietnam-on-rhino>.

concern over the poaching problem and sought to strengthen their cooperation in the field of bio-diversity conservation and protection through further bilateral agreements.<sup>335</sup> They also discussed finalizing the MoU, the scope of which will include provisions on bio-diversity management, law enforcement, CITES compliance.<sup>336</sup> The MoU would also require Vietnamese efforts to increase public awareness of the problem by providing education about legal rhino hunting in Vietnam.<sup>337</sup>

On December 10, 2012, the MoU was officially signed by Minister Molewa and H.E. Cao Duc Phat, Vietnam's Minister of Agriculture and Rural Development.<sup>338</sup> At the signing ceremony, Minister Molewa stated that "South Africa is looking forward to receiving the close cooperation from Vietnamese partners to stop the illegal trade of rhino horns."<sup>339</sup> Agreeing, Minister Cao Duc Phat stated that the fight "against crime on wildlife regulations especially on the rare, precious and endangered species including rhinos . . . are always of concern to the Vietnam government . . . . The Ministry of Agriculture and Rural Development . . . are [sic] submitting the Prime Minister to issue a Decision on banning the import of all rhino specimens to Vietnam."<sup>340</sup> Although the MoU is written in general terms, it indicates that rhino horn trafficking will be at the top of the policy agenda for the two nations.<sup>341</sup>

The epidemic of rhino poaching is a global concern not only limited to South Africa and Vietnam. An international effort will be required to address the problem; and many countries will have to become involved. Kenyan citizens have created an on-line petition to

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<sup>335</sup> See *SA, Vietnam Discussing Poaching*, *supra* note 334; *SA-Vietnam Relations Bolstered at Forum*, S. AFR. GOV'T NEWS AGENCY (Aug. 17, 2012), <http://oldsanews.gcis.gov.za/rss/12/12081715051001>.

<sup>336</sup> See *SA-Vietnam Relations Bolstered at Forum*, *supra* note 335; Blaine, *supra* note 334.

<sup>337</sup> See *SA-Vietnam Relations Bolstered at Forum*, *supra* note 335; Blaine, *supra* note 334.

<sup>338</sup> See *Signing of MoU Between SA and Vietnam to Help Tackle Conservation Efforts*, WORLD WILDLIFE FUND (Dec. 10, 2012), <http://www.wwf.org.za/?7360/MoU-between-SA-and-Vietnam>.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> See *id.*

compel the Chinese government to act against the poaching and trafficking of rhino horns.<sup>342</sup> Five other African Countries—Zimbabwe, Botswana, Zambia, Angola, and Namibia—have legalized the sale of rhinoceros horn powder in pharmacies, hoping to reduce the profitability of the illegal trade.<sup>343</sup> The Australian government has suggested using microdots, originally used to track stolen vehicles, to track rhino horns and poachers.<sup>344</sup> Activists in India have tried to enlist the help of reformed poachers to inform on their former gangs.<sup>345</sup>

The United Kingdom, a leading member of CITES, has been working to unite the international community and debunk the myth of rhino horns' medicinal effects, to create public awareness of the poaching crisis, and to encourage the sharing of intelligence and policing tactics.<sup>346</sup> In January 2012, the U.K.'s Department for Environment, Food, and Rural Affairs invested over one million pounds in a wide range of projects to protect endangered species, including the white rhinoceros.<sup>347</sup> The U.K. government is committed to being a pioneer in, and an example of, international conservation.<sup>348</sup>

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<sup>342</sup> See *Kenya: New Campaign to Stop Rhino Poaching in Country*, NAIROBI STAR (Kenya), Oct. 21, 2011, <http://www.the-star.co.ke/news/article-44702/new-campaign-stop-rhino-poaching-kenya>.

<sup>343</sup> See Bill Corcoran, *Decision of Five African States to Sell Rhino Horn Criticized*, IRISH TIMES, Mar. 31, 2012, at 11, <http://irishtimes.newspaperdirect.com/screenprint/viewer.aspx>.

<sup>344</sup> See *Microdots Could Help Combat Poaching*, INDO-ASIAN NEWS SERV. (India), Oct. 14, 2011, [http://newshopper.sulekha.com/microdots-could-help-combat-poaching\\_news\\_1357565.htm](http://newshopper.sulekha.com/microdots-could-help-combat-poaching_news_1357565.htm).

<sup>345</sup> See Powell, *supra* note 236.

<sup>346</sup> See *UK Secures International Agreement to Combat Illegal Rhino Trade*, *supra* note 20.

<sup>347</sup> See *PS1.3 Million Government Pledge to Protect Our Most Endangered Species*, EUR. UNION NEWS, Jan. 11, 2012.

<sup>348</sup> See *id.* The U.K. has the support of Prince Charles, president of the WWF in the U.K. and an avid activist for wildlife conservation, as well as his son William, Duke of Cambridge. See James Edgar, *Charles Spots Endangered Rhino*, PRESS ASS'N (S. Afr.), Nov. 4, 2011; Ross Lydall, *William: We Must End Killing or Our Children Will Not See These Animals*, EVENING STANDARD (U.K.), June 19, 2012, at 13. The Prince recently spotted a rhino in his travels to South Africa and saw

Finally, the United States, in conjunction with several other countries, has started a partnership called the Trans-Pacific Partnership to address environmental challenges, such as illegal trade in wildlife like the white rhino.<sup>349</sup> In May 2012, the U.S. Senate Foreign Relations Committee held a hearing on the poaching problem in Africa, hearing from wildlife experts and organizations including the WWF and TRAFFIC.<sup>350</sup> Senator John Kerry, Chairman of the Committee, stated that “[p]oaching is not just a security threat . . . [i]t’s also a menace . . . thriv[ing] where government is weakest. Poachers . . . are a danger to . . . rangers and civilians as well as the animals they target.”<sup>351</sup> U.S. Federal Agents have also actively reduced the rhino horn trade in the U.S.<sup>352</sup> in cooperation with South African wildlife authorities.<sup>353</sup> In an unprecedented event on illegal wildlife trafficking held on November 8, 2012, U.S. Secretary of State

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exactly how rhinoceros are being protected from poachers by the South African government. See Edgar, *supra*.

<sup>349</sup> See *US Trade Representative Green Paper on Conservation and the Trans-Pacific Partnership*, US FED NEWS, Dec. 5, 2011 (the U.S. is currently in negotiations with Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam, who are all members of CITES. The Trans-Pacific Partnership (TPP) aims to advance the countries’ common interests in enhancing trade and economic growth by coordinating responses to illegal trade in wild flora and fauna. The U.S. specifically chose countries to participate in TPP that are integral to such illegal trade and whose economies depend on such trade. The TPP’s aims are conservation and protection of biodiversity. The U.S., through TPP, has made several proposals, such as prompt reporting and information sharing, mechanisms for cooperation among law enforcement, more partnerships with other similarly oriented organizations, greater restrictions of trade in wildlife, and stricter following of implementations under CITES).

<sup>350</sup> See *WWF Statement on Senate Hearing on African Poaching Crisis*, STATE NEWS SERV., May 24, 2012, <http://www.prweb.com/releases/2012/5/prweb9543974.htm> (“[W]ildlife crimes need[] to be treated with the same seriousness and level of attention that we give other transnational organized crimes”).

<sup>351</sup> See *id.*

<sup>352</sup> See Lee Rondganger, *Operation Crash Crushes Rhino Horn Ring: US Agents Arrest Seven, Including an Antiques Expert*, STAR (S. Afr.), Feb. 24, 2012, at 11, <http://www.iol.co.za/dailynews/news/rhino-horn-breakthrough-1.1242087#.UUyCWIVpe0c> (reporting that Operation Crash, an 18 month investigation, lead to the arrest of at least seven people involved in the illegal trade of rhinoceros horns); U.S. Dep’t of Justice Env’t & Natural Res. Div., *Federal Officials Announce Nationwide Crackdown on Black Market Rhino Trade*, US FED NEWS, Feb. 23, 2012.

<sup>353</sup> See Rondganger, *supra* note 352.

Hillary Clinton also recognized the problem, stating that “wildlife trafficking has serious implications for the security and prosperity of people around the world.”<sup>354</sup>

The United Nations has also taken an interest, calling for its member nations to “step-up” and combat the illegal rhino trade.<sup>355</sup> Working together on an international level will be the best way, and maybe the only way, to end the illegal trade of white rhinoceros horns.

### CONCLUSION

There is still more to be done to combat rhinoceros poaching and the illegal trade in rhino horns. People around the world are campaigning,<sup>356</sup> protesting,<sup>357</sup> and petitioning<sup>358</sup> their governments to pay more attention to poaching and to work to stop it. Conservation

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<sup>354</sup> See *Secretary of State Clinton Calls for End to Illegal Wildlife Trafficking*, WORLD WILDLIFE FUND (Nov. 8, 2012), <http://worldwildlife.org/stories/secretary-of-state-clinton-calls-for-end-to-illegal-wildlife-trafficking>.

<sup>355</sup> See *Head of UN-Backed Convention Urges Greater Effort to Combat Illegal Rhino Trade*, *supra* note 127.

<sup>356</sup> See *Kenya: New Campaign to Stop Rhino Poaching in Country*, *supra* note 342.

<sup>357</sup> See Maregele, *supra* note 28 (describing the scene outside South Africa’s Parliament on National Rhino Day: protestors drew a chalk outline of a rhino horn and splattered the pavement with red paint. In protest of the South African government’s lax on anti-poaching enforcement. Signs were seen saying “will your children get to see a rhino?” and protestors were chanting “no bail, straight to jail.” The protestors hope the government will take harsher actions against poachers and greater strides to protect the endangered species).

<sup>358</sup> See Edward West, *Zuma to Get Ultimatum to End Rhino Poaching*, BUS. DAY (S. Afr.), Dec. 29, 2011, <http://www.bdlive.co.za/articles/2011/12/29/zuma-to-get-ultimatum-to-end-rhino-poaching;jsessionid=A13531D3681882AB56345432A5D5FF96.present2.bdfm> (animal conservationists have put together a “Rhino Ultimatum” to present to South African President Zuma and several other South African government officials to urge greater government action against poachers. The ultimatum will call for new laws on sales of state-owned rhinoceros, a census of the rhinoceros population, a moratorium on rhino-hunting trophy permits, a lift of the media “gag” so officers can comment on the situation to the media, to engage more actively with demand countries like Vietnam, and to exhibit greater compliance with CITES. The petition already has over 7,000 signatures and hopes to get upwards of 250,000).

groups have created plans to stop poaching.<sup>359</sup> However, poaching will continue despite South African efforts to curb supply as long as the demand in Asian countries like Vietnam remains. Therefore, it is of the utmost importance to educate people that rhinoceros horns do not cure cancer and other ailments. Unfortunately, convincing the Vietnamese citizens may be easier said than done. If they abandon this myth, the demand for rhino horns will fall off drastically, thereby eliminating the poachers' financial incentives.

Additionally, a continued international effort against poaching will be important. Cooperation and shared intelligence will make breaking trade routes and law enforcement efforts easier, placing more pressure on poachers and traffickers themselves. Eventually, poaching risks will begin to outweigh the benefits. This will be especially true if nations increase statutory penalties for illegal poaching and trading of rhinoceros horn.

Finally, it is important for each country, individually, to continue efforts to stop rhino poaching and trading. While South Africa has taken great strides, there is still more that it can do, including cracking down on so called "khaki-colored" crimes. More importantly, Vietnam, which has slowly begun to take action, must implement and enforce a stricter regulatory system. With these recommendations, as well as continued education and support from activists around the world, the white rhinos can grow and flourish for future generations instead of ending up like the Javan and Black rhino—extinct. One can only hope.

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<sup>359</sup> See, e.g., Tony Carnie, *Legal Rhino Horn Sales Plan Mooted*, STAR (S. Afr.), July 13, 2012, at 5, <http://www.iol.co.za/the-star/legal-rhino-horn-sales-plan-mooted-1.1340555#.UUyFR4VpfC4> (one conservation group proposed a plan to sell horns legally directly to Asian pharmaceutical companies and to use the money to fund rhinoceros protection); *Rhino Summit in Nairobi Develops Action Plan*, ETURBO NEWS (Uganda), Apr. 7, 2012, <http://www.eturbonews.com/28680/rhino-summit-nairobi-develops-action-plan> (conservation group African Wildlife Foundation met with wildlife authorities, private rhino reserve owners, and other conservation groups to outline an action plan. The plan consisted mainly of expanding support for surveillance to officials and lobbying for amendments to change financial penalties and prison terms).